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APPENDIX

IN THE

Supreme Court of the United States

October Term, 1971
No. 71-1178

Gulf States Utilities Company,

Petitioner,

vs.

Federal Power Commission, Et Al

Respondents

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

Petition for Certiorari Filed March 13, 1972
Certiorari Granted May 30, 1972

APPENDIX

LIST OF CONTENTS

	Page
Docket Entries in the Court below	A-2, 3
Joint Appendix (with complete index at pp. i, ii, immediately under the top cover) as filed in the Court below on review of orders of the Federal Power Commission	A-4

Petition for Certiorari includes at the pages indicated the following items from the Court below:

1. Opinion, App. A at pp. 1a-29a, incl.

2. Judgment, App. B at p. 30a

3. Order denying Petition for Rehearing, App. C at p. 31a

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71-1041

A-2

GENERAL DOCKET

UNITED STATES COURT OF APPEALS

FOR THE

DISTRICT OF COLUMBIA CIRCUIT

TION FOR REVIEW OF ORDER OF THE FEDERAL POWER COMMISSION. 71-1041

TITLE OF CASE	ATTORNEYS FOR APPELLANT
City Of Lafayette, Louisiana City of Plaquemine, Louisiana Petitioners v. Federal Power Commission Respondent Gulf States Utilities Company, Intervenor	George Spiegel 333-8860 Robert C. McDiarmid 2600 Virginia Ave. N.W. (20037)
	ATTORNEYS FOR APPELLEE
	Gulf States Utilities Co~~mpany for leave to intervene~~: Intervenor John B. Holtzinger, Jr. 1140 Conn. Ave. 20036 Gordon Gooch 393-5443 441 6th St. N.W. 20426 Federal Power Commission J. Richard Tiano Asst. Solicitor 386-4585 20426

NO. BELOW:

JUDGE BELOW:

DATE OF JUDGMENT:

NATURE OF APPEAL AND RELIEF:

DATE	ACCOUNT OF APPELLANT	RECEIVED	DISBURSED	REMARKS
1-14-71	#40256 CA521 JAN 18 1971 RETURN TO TEAS.	25	00	

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BIENNIAL DOCKET A-3

UNITED STATES COURT OF APPEALS
FOR THE
DISTRICT OF COLUMBIA CIRCUIT

71-1041

DATE	FILINGS--PROCEEDINGS	Filed
-14-71	Petition for Review of Order of F.P.C.	
1-14-71	Certified copy of Petition mail to F.P.C. January 14, 1971	
-19-71	4-Motion of Gulf States Utilities Co, for leave to Intervene (m-19)	
-1-71	Clerk's order granting motion of Gulf Utilities Company, for leave to intervene	
23-71	Certified Index to Record (n)	
10-71	25-Petitioner's brief (m-10)	
10-71	4-Petitioner's motion to expedite oral argument (m-10)	
10-71	4-Respondent's (FPC) limited joinder of The Federal Power Commission (m-10)	
10-71	4-Joint motion with respect to briefs, appendix, and related procedures (m-10)	
25-71	Order per CJ Bazelon that respondent's and intervenor's printed brief should be filed by May 21st, petitioner's printed reply brief, if any, and the printed appendix shall be filed by May 28th; the clerk is directed to set this case for argument on the merits during the latter part of June , 1971 session if the business of the court permits.	
5-21-71	25-Intervenor's brief (m-21)	
5-21-71	25-Respondent's brief (m-21)	
5-28-71	25-Petitioner's reply brief (m-28)	
5-28-71	10-Joint appendix (m-28)	
6-17-71	Argued before CJ Bazelon, Fahy, Senior Circuit Judge and Leventhal, Circuit Judges. The Court granted counsel for respondent leave to file a supplemental memorandum on or before June 27th.	
6-24-71	4-Respondent's supplemental memorandum(m-23)	
10-12-71	Opinion by Circuit Judge Leventhal (filed under No. 24,764)	
10-12-71	Judgment remanding case to the Federal Power Commission for further proceedings consistent with opinion (n)	
10-22-71	4-Motion of Gulf States Utilities Company Intervenor to stay the Issuance of the Mandate (m-20)	
10-22-71	4-Motion of Intervenor to extend time to file petition for rehearing to November 25th (m-20)	
11-5-71	Per Curiam order granting intervenor's motion to extend time to file petition for rehearing to November 25th; Clerk is directed to stay the issuance of the opinion and certified copy of the judment to seven days after action on petition for rehearing CJ Bazelon, Fahy, Sr. CJ and Leventhal, CJ.	
11-24-71	25-Intervenor's petition for rehearing on petition to review (m-22)	
12-15-71	Per Curiam order denying intervenor's petition for rehearing. CJ Bazelon, Fahy, Sr. CJ and Leventhal, CJ	
12-23-71	Certified copy of opinion and judgment issued to the Federal Power Commission	
2-16-72	Notice of filing petition for certiorari on February 14, 1971 in (S.C. # 71-1041)	
3-16-72	Notice of filing petition for certiorari on March 13, 1972 in S.C. #71-1041	
6-1-72	Certified copy of order of Supreme Court granting certiorari on May 30, 1972 in Supreme Court number 71-1178	

A true copy:
Test: NATHAN J. PAULSON, Clerk
United States Court of Appeals
for the District of Columbia Circuit.

By: _____, Deputy Clerk

INDEX

Document	Record Page Begin	Record Page End	Appendix Page Begin	Appendix Page End
Application of Gulf States Utilities.....	1	12	1	12
Exhibit B.....	13	26	13	26
Exhibit D.....	27	28	27	28
Exhibit E.....	29		29	
Exhibit F-1.....	30	32	30	32
Exhibit F-2.....	33	34	33	34
Exhibit G.....	35		35	
Exhibit H.....	36	42	36	42
Exhibit I.....	43		43	
Exhibit J.....	44		44	
Exhibit K.....	45		45	
Exhibit L.....	46	51	46	51
Exhibit M.....	52		52	
FPC Notice of Application.....	53		53	
Protest and Petition to Intervene by Cities of Lafayette and Plaquemine, Louisiana.....	54	67	54	67
Appendix A.....	69	80	69	80
Appendix B.....	81	117	81	117
Appendix C.....	118	155	118	155
Appendix D.....	156	160	156	160

Document	Record Page Begin	Record Page End	Appendix Page Begin	Appendix Page End
Gulf States Amendment No. 1, Exhibit N.....	215	220	161	164
Answer of Gulf States Utilities Company to Protest and Petition to Intervene.....	263	274	165	176
Gulf States Amendment No. 2, Exhibit N-1.....	277	282	177	180
FPC Order Authorizing Issuance of First Mortgage Bonds, Granting Intervention and Denying Hearing..	300	304	181	185
FPC Supplemental Order Authorizing Issuance of First Mortgage Bonds.	310	311	186	187
Application for Rehearing by Cities of Lafayette and Plaquemine, Louisiana.....	312	319	188	195
Gulf States Amendment No. 4, Exhibit N-2.....	375	379	196	199
FPC Order Denying Application for Rehearing.....	410	411	200	201

A-7

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71-1041

CITY OF LAFAYETTE, LOUISIANA
CITY OF PLAQUEMINE, LOUISIANA,

Petitioners,

v.

FEDERAL POWER COMMISSION,

Respondent,

GULF STATES UTILITIES COMPANY,

Intervenor.

ON PETITIONS FOR REVIEW OF ORDERS OF THE

FEDERAL POWER COMMISSION

JOINT APPENDIX

UNITED STATES OF AMERICA

BEFORE THE FEDERAL POWER COMMISSION

Application of GULF STATES UTILITIES COMPANY for Authorization of the Issuance of $30,000,000 Principal Amount of First Mortgage Bonds under Section 204(a) of the Federal Power Act	)	Docket No._____

A. Name and address of the applicant.

Gulf States Utilities Company
P. O. Box 2951
Beaumont, Texas 77704

B. State of incorporation.

The Company was incorporated under the laws of Texas on August 25, 1925 and is qualified to do business in Louisiana.

C. Persons authorized to receive notices.

F. R. Smith, President and Principal Executive Officer
Gulf States Utilities Company
P. O. Box 2951
Beaumont, Texas 77704

J. M. Stokes, Vice President-Finance and Secretary
Gulf States Utilities Company
P. O. Box 2951
Beaumont, Texas 77704

D. Description of the securities to be issued or the liabilities to be assumed.

$30,000,000 principal amount of First Mortgage Bonds, ___* %___ Series A due 2000 (hereinafter referred to as the "New Bonds"). The New Bonds will be issued under the Company's Indenture of Mortgage dated September 1, 1926, as heretofore supplemented and modified and as to be further supplemented by a Twenty-ninth Supplemental Indenture. The New Bonds and the Twenty-ninth Supplemental Indenture are to be dated as of the first

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* To be supplied by amendment.

day of the month in which the New Bonds are issued (presently expected to be December 1, 1970). The New Bonds are to be due thirty years from such date and will not have any voting privileges.

E. Method of issuance and sale.

The Company proposes to sell the New Bonds at competitive bidding in accordance with the applicable requirements of Section 34.1a of the Commission's Regulations under the Federal Power Act. The proposed issuance of securities has not been exempted by the Commission from the competitive bidding requirements of its Rules and is not the subject of an application for such exemption.

F. Proposed method of complying with the competitive bidding requirements of Section 34.1a (b) and (c).

The Company proposes to invite bids on or about November 24, 1970 (unless postponed) for the purchase of the New Bonds by newspaper publication of a "Notice of Invitation for Bids for the Purchase of First Mortgage Bonds" and through distribution of a "Public Invitation for Bids for the Purchase of $30,000,000 First Mortgage Bonds, _____% Series A due 2000" setting forth the terms and conditions relating thereto. The Public Invitation will provide that each bid for the New Bonds must be for the purchase of all of the New Bonds. A bid may be made by a single bidder or by a group of bidders. In case the bid of a group of bidders is accepted, the obligations of the members of the group shall be several and not joint. No bidder may submit or participate in more than one bid for the New Bonds. All bids must be on the Form of Bid furnished by the Company and must be signed by the bidder, or in the

case of a group of bidders, by the Representative on behalf of the group.

All bids shall specify the interest rate of the New Bonds, which shall be a multiple of 1/8%, and the price (exclusive of accrued interest) to be paid to the Company for the New Bonds, which shall not be less than 99% nor more than 102 1/2% of the principal amount of the New Bonds, and that accrued interest from the date of the New Bonds to the date of payment therefor and delivery thereof will be paid to the Company by the Purchasers. Each bid must be accompanied by a certified or official bank check or checks in the aggregate amount of $900,000, and all bids must be presented to the Company before 11:00 A.M., New York Time on December 9, 1970 (unless postponed).

Unless the Company rejects all bids (which it reserves the privilege to do) or excludes a bid or bids for reasons specified in the Public Invitation, it will accept the bid which provides the lowest "cost of money" determined as provided in the Public Invitation. A copy of the Notice of Invitation, Public Invitation and Form of Bid for the Purchase of First Mortgage Bonds, including Terms of Purchase, such Form of Bid and Terms of Purchase collectively constituting the Bond Purchase Contract, will be filed by amendment to this Application as Exhibits 0-1, 0-2 and 0-3, respectively.

G. Data in compliance with the competitive bidding requirements of Section 34.1a (c).

To be supplied by amendment.

R-4

H. Fees and control.

(1) Fees.

None.

(2) Control.

To be supplied by amendment.

I. Statement showing the price to the public, underwriting commissions, and net proceeds.

Information as to the price to the public, underwriting commissions and net proceeds to the Company from the New Bonds will be supplied by amendment. Set forth below is a table prepared on an estimated basis showing the information required in Section 131.43.

	Description		New Bonds
1.	Face value or principal amount.....		$30,000,000
2.	Plus premium or less discount.....		-0-
3.	Gross proceeds.....		$30,000,000
4.	Underwriters' spread or commission.....		$ -0-
5.	Securities and Exchange Commission registration fee.....		6,150
6.	State mortgage registration fee.....		-0-
7.	State commission fee.....		-0-
7a.	Qualification under Blue Sky laws.....		300
8.	Fee for recording indenture.....		4,000
9.	United States document tax.....		-0-
10.	Printing and engraving expenses.....		4,000
11.	Trustee's fees and expenses in connection with issuing New Bonds (including counsel).....		12,000
12.	Counsel fees.....		15,000
13.	Accountant's fees.....		4,000
14.	Miscellaneous expenses of issue:		
	Advertising for bids.....	$1,000	
	Telephone, telegraph, traveling and incidental expenses.....	6,550	7,550
15.	Total deductions.....		$ 63,000
16.	Net amount realized (estimated).....		$29,937,000

J. Purpose for which the securities are to be issued.

The proceeds from the sale of the New Bonds will be used by the Company to refund and pay off part of its commercial paper and short-term notes to banks to be outstanding as of the date of issuance. The Company estimates that on December 16, 1970, the date the securities are expected to be sold, there will be outstanding approximately $55,000,000 principal amount of commercial paper and short-term notes issued on various dates. The aforesaid commercial paper and short-term notes to banks constitute an issuance of securities previously authorized by the Commission (Docket No. E-7509).

K. Description of business:

The Company is engaged principally in the business of generating, distributing and selling electric energy in southeastern Texas and south central Louisiana in an area about 350 miles long, having an estimated population of 1,225,000 and comprising approximately 28,000 square miles. The Company sells electric energy at retail in 296 communities and surrounding territory; and sells for resale, electric energy to 9 municipal systems, 11 rural electric cooperatives (including 4 municipal systems through one of these cooperatives) and one other utility. Natural gas is purchased at wholesale and distributed at retail in the City of Baton Rouge, Louisiana and vicinity.

L. License issued by the Commission:

The Company holds a Minor-Part License (Transmission Line) issued by March 29, 1966 Order of the Commission for a transmission line (Project No. 2504) in Jasper and Tyler Counties, Texas. The license became effective as of March 1, 1966 and will terminate as of December 31, 1985.

M. Names and addresses of counsel who have passed upon the legality of the proposed issuance:

Orgain, Bell & Tucker
Beaumont Savings Building
Fourth Floor
Beaumont, Texas 77701

Taylor, Porter, Brooks
& Phillips
P. O. Box 2471
Baton Rouge, Louisiana 70821

N. Statement of applications, registration statements, etc., required to be filed with any other Federal or State regulatory body:

A Registration Statement on Form S-9 (Exhibit N hereto), is required and is being filed with the Securities and Exchange Commission.

O. Propriety of issue:

The laws of Texas under which the Company is organized and the laws of Louisiana in which the Company is qualified to do business permit the Company to issue its securities for proper corporate purposes, including the purposes set forth in response to Item J hereof. The purposes are necessary and appropriate for and consistent with the proper performance by the Company of service as a public utility. The issuance of the securities will not impair the Company's ability to perform such service and is reasonably necessary and appropriate for such purposes.

P. Statement of all rights to be a corporation, franchises, permits, and contracts for consolidation, merger, or lease included as assets:

The Company, or any predecessor thereof, has not included as assets any amount representing rights to be a corporation, franchises, permits, and contracts for consolidation, merger, or lease. The issuance of the new securities will not result in the capitalization of the right to be a corporation or of any franchise, permit, or contract for consolidation, merger or lease.

Q. Form of Notice.

Take notice that on _____, 1970, Gulf States Utilities Company (Applicant) filed an application seeking an order pursuant to Section 204 of the Federal Power Act authorizing the issuance of $30,000,000 principal amount of First Mortgage Bonds.

Applicant is incorporated under the laws of Texas with its principal business office at Beaumont, Texas, and is engaged in the electric utility business in portions of Louisiana and Texas. Natural gas is purchased at wholesale and distributed at retail in the City of Baton Rouge and vicinity.

The Applicant proposes to sell the new securities at competitive bidding in accordance with the Commission's Regulations under the Federal Power Act. The Applicant proposes to invite bids on or about November 24, 1970, for the purchase of the new securities.

The proceeds from the sale of the new securities will be used to pay off part of the Company's outstanding short-term notes with commercial banks and unsecured promissory notes in the form of commercial paper, previously authorized by the Commission.

Any person desiring to be heard or to make any protest with reference to said application should on or before _____, 1970, file with the Federal Power Commission, Washington, D.C. 20426, petitions or protests in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 1.8 and 1.10).

All protests filed with the Commission will be considered by it in determining the appropriate action to be taken but will not serve

to make the protestants parties to the proceeding. Persons wishing to become parties to a proceeding or to participate as a party in any hearing therein must file petitions to intervene in accordance with the Commission's rules. The application is on file with the Commission and available for public inspection.

Listed below are Exhibits to this Application. References in the right-hand column indicate Exhibits previously filed with the Federal Power Commission which are incorporated herein by such reference.

Exhibit	Description	Reference
A	Restated Articles of Incorporation of the Company.	Docket No. E-7430 Exhibit A
B	Bylaws of the Company as amended to date.	
C- 1	Indenture of Mortgage dated September 1, 1926.	Docket No. 5452-S Exhibit D
C- 2	First Supplemental Indenture dated as of May 1, 1929.	Docket No. 5452-S Exhibit E
C- 3	Second Supplemental Indenture dated as of June 1, 1931.	Docket No. 5452-S Exhibit F
C- 4	Third Supplemental Indenture dated as of October 1, 1936.	Docket No. IT-6081 Exhibit D-9
C- 5	Fourth Supplemental Indenture dated as of September 1, 1938.	Docket No. IT-6081 Exhibit D-10
C- 6	Indenture dated March 21, 1939.	Docket No. IT-6081 Exhibit D-11
C- 7	Fifth Supplemental Indenture dated as of May 1, 1939.	Docket No. IT-6081 Exhibit D-12
C- 8	Sixth Supplemental Indenture dated as of August 1, 1944.	Docket No. IT-6081 Exhibit D-13

RS

Exhibit	Description	Reference
C- 9	Seventh Supplemental Indenture dated as of May 1, 1946.	Docket No. IT-6081 Exhibit D-14
C-10	Eighth Supplemental Indenture dated as of April 1, 1948.	Docket No. E-6124 Exhibit D-13
C-11	Ninth Supplemental Indenture dated as of December 1, 1949.	Docket No. E-6242 Exhibit D-15
C-12	Tenth Supplemental Indenture dated as of June 1, 1950.	Docket No. E-6287 Exhibit D-15
C-13	Eleventh Supplemental Indenture dated as of November 1, 1951.	Docket No. E-6378 Exhibit D-16
C-14	Twelfth Supplemental Indenture dated as of December 1, 1952.	Docket No. E-6458 Exhibit D-16
C-15	Thirteenth Supplemental Indenture dated as of December 1, 1953.	Docket No. E-6525 Exhibit D-17
C-16	Fourteenth Supplemental Indenture dated as of September 1, 1956.	Docket No. E-6698 Exhibit D-16
C-17	Fifteenth Supplemental Indenture dated as of October 1, 1957.	Docket No. E-6771 Exhibit D-17
C-18	Sixteenth Supplemental Indenture dated as of May 1, 1958.	Docket No. E-6811 Exhibit D-18
C-19	Seventeenth Supplemental Indenture dated as of January 1, 1959.	Docket No. E-6855 Exhibit D-19
C-20	Eighteenth Supplemental Indenture dated August 12, 1959.	Docket No. E-6903 Exhibit D-20
C-21	Nineteenth Supplemental Indenture dated as of December 1, 1959.	Docket No. E-6903 Exhibit D-21
C-22	Twentieth Supplemental Indenture dated as of July 1, 1960.	Docket No. E-6936 Exhibit D-22
C-23	Twenty-first Supplemental Indenture dated as of May 1, 1962.	Docket No. E-7030 Exhibit D-23
C-24	Twenty-second Supplemental Indenture dated as of January 1, 1966.	Docket No. E-7259 Exhibit C-24

R.10

Exhibit	Description	Reference
C-25	Twenty-third Supplemental Indenture dated as of February 1, 1967.	Docket No. E-7328 Exhibit C-25
C-26	Twenty-fourth Supplemental Indenture dated as of February 1, 1968.	Docket No. E-7391 Exhibit C-26
C-27	Twenty-fifth Supplemental Indenture dated as of October 1, 1968.	Docket No. E-7438 Exhibit C-27
C-28	Twenty-sixth Supplemental Indenture dated as of March 1, 1969.	Docket No. E-7463 Exhibit C-28
C-29	Twenty-seventh Supplemental Indenture dated as of September 1, 1969.	Docket No. E-7497 Exhibit C-29
C-30	Twenty-eighth Supplemental Indenture dated as of February 1, 1970.	Docket No. E-7518 Exhibit C-30
C-31	Proposed Twenty-ninth Supplemental Indenture to be dated as of the first day of the month in which the New Bonds are issued.	To be supplied by amendment.
C-32	Trust Indenture dated as of October 1, 1961.	Docket No. E-7008 Exhibit D-24
C-33	Letter Agreements with commercial banks providing for unsecured loans through December 31, 1970.	Docket No. E-7509 Exhibit C-33
D	Proposed Resolutions of Board of Directors of the Company authorizing the issue of the New Bonds.	
E	The names, titles and addresses of principal officers of the Company.	
F-1	Opinion of Messrs. Orgain, Bell & Tucker.	
F-2	Opinion of Messrs. Taylor, Porter, Brooks & Phillips.	
G	Statement of the measure of control or ownership exercised by or over the Company.	

Exhibit	Description	Reference
H	Balance sheet of the Company in conformity with the forms in Section 131.40 and Section 131.41.	
I	Statement showing certain details for each class and series of capital stock.	
J	Statement showing certain details for each class and series of funded debt.	
K	Statement of all known material contingent liabilities.	
L	Comparative income statements in conformity with the form in Section 131.42.	
M	Analysis of surplus for the period covered by the income statements referred to in Exhibit L above.	
N	Registration Statement filed with the Securities and Exchange Commission.	To be supplied by amendment.
O-1	Notice of Invitation for Bids for the Purchase of Bonds.	To be supplied by amendment.
O-2	Public Invitation for Bids for the Purchase of Bonds.	To be supplied by amendment.
O-3	Form of Bid for Purchase of Bonds.	To be supplied by amendment.
P	Not applicable.	
Q	Not applicable.	
R	Not applicable.	

Respectfully submitted,

GULF STATES UTILITIES COMPANY

J. M. STOKES

By _____
J. M. Stokes
Vice President-Finance
and Secretary

VERIFICATION

STATE OF TEXAS)
) SS:
COUNTY OF JEFFERSON)

J. M. Stokes, being first duly sworn, deposes and says: That he is Vice President-Finance and Secretary of Gulf States Utilities Company, the applicant for authorization of the issuance of securities, that he has read the foregoing application and knows the contents thereof; that the same are true to the best of his knowledge and belief.

J. M. STOKES

Subscribed and sworn to before me this 9th day of October, 1970.

SANDRA G. ANGELLE

Notary Public

(NOTARIAL SEAL)

K 13

EXHIBIT B
(FPC)
Oct 12 9 15 AM '70
FEDERAL POWER COMMISSION

GULF STATES UTILITIES COMPANY

I, J. M. Stokes, Vice President-Finance and Secretary of Gulf States Utilities Company, a Texas corporation, hereby certify that the attached is a full, true and correct copy of the Bylaws of said Company, as amended February 27, 1970, and as the same are now in force.

IN WITNESS WHEREOF I have hereunto set my hand and have affixed the corporate seal of Gulf States Utilities Company this 9th day of October, 1970.

Vice President-Finance and
Secretary

2-27-70

R 14

BYLAWS

of

Oct 12 9 15 AM '70
FEDERAL POWER COMMISSION

GULF STATES UTILITIES COMPANY

ARTICLE I.

Name.

The name of this Corporation shall be GULF STATES UTILITIES COMPANY.

ARTICLE II.

Shareholders' Meetings.

All meetings of the Shareholders shall be held at the Royal Coach Inn, 55 Interstate 10 N, in the City of Beaumont, Texas. With or without motion, the Chairman of any meeting of the Shareholders may appoint Inspectors and Tellers for such meeting who shall examine into the qualifications of the Shareholders present in person or represented at the meeting by proxy, report the shares represented at the meeting and tabulate the vote on such matters as may come before the meeting.

ARTICLE III.

Annual Meeting.

The Annual Meeting of the Shareholders of this Corporation shall be held on the second Wednesday in May in each year if not a legal holiday and, if a legal holiday, then on the next succeeding Wednesday not a legal holiday. In the event that such Annual Meeting is omitted by oversight or otherwise on the date herein provided for, the Directors shall cause a meeting in lieu thereof to be held as soon thereafter as conveniently may be, and any business transacted or elections held at such meeting shall be as valid as if transacted or held at the Annual Meeting. Such subsequent meeting shall be called in the same manner and as provided for Special Shareholders' Meetings.

ARTICLE IV.

Special Meetings.

Special Meetings of the Shareholders of this Corporation shall be held whenever called by the Chairman of the Board of Directors, the President, a Vice President or a majority of the Board of Directors, or whenever the

holder or holders of one-tenth (1/10) of the shares of the capital stock issued and outstanding and entitled to vote shall make written application therefor to the Secretary or an Assistant Secretary, stating the time and purpose of the meeting applied for. Special Meetings of the Shareholders shall also be held following the accrual or termination of the right of the preferred stock of the Corporation, voting as a class, to elect the smallest number of Directors of this Corporation necessary to constitute a majority of the members of the Board of Directors, whenever requested to be called in the manner provided in Paragraph 6 of Article VI of the Articles of Incorporation of the Corporation as amended.

ARTICLE V.

Notice of Shareholders' Meetings.

Written or printed notice of all Shareholders' Meetings, stating the time and place, and, in the case of Special Meetings, the purpose or purposes for which such meetings are called, shall be delivered by the Secretary or an Assistant Secretary, by mail, to each Shareholder of record, having voting power in respect of the business to be transacted thereat, at his or her registered address, at least ten (10) and not more than fifty (50) days prior to the date of the meeting, and the person giving such notice shall make affidavit in relation thereto; provided that such notice shall be deemed to be delivered when deposited in the United States mail addressed to the Shareholder at his address as it appears on the stock transfer books of the Corporation, with postage thereon prepaid, and further provided that notice of any such meeting shall be deemed to be sufficiently delivered to any Shareholder who, while the provisions of the Trading with the Enemy Act (Public Act No. 91 of the Sixty-fifth Congress of the United States of America, as now or hereafter amended) shall be operative, shall appear from the stock books to be or shall be known to the Corporation to be an "enemy" or "ally of enemy" as defined in the said Act and whose address appearing on such stock books is outside the United States, or the mailing to whom of notice shall at the time be prohibited by any other law of the United States of America or by any executive order or regulation issued or promulgated by any officer or agency of the United States of America (a) if, at least ten (10) days prior to the date of the meeting, a copy of the notice of the meeting shall be mailed to any person or agency who by any such law, order or regulation shall have been duly designated to receive such notice or duly designated or appointed as custodian of the property of such Shareholder; or (b) if a brief notice of such meeting, including, in the case of a Special Meeting, either a brief statement of the objects for which such meeting is called or a statement as to where there may be obtained a copy of a written notice containing a statement of such objects,

shall be published by the Corporation at least once, not less than ten (10) days before the meeting in a daily newspaper published in the English language and of general circulation in the City of Beaumont, Texas.

Any meeting at which all Shareholders having voting power in respect of the business to be transacted thereat are present, either in person or represented by proxy, or of which those not present have waived notice in writing, shall be a legal meeting for the transaction of business, notwithstanding that notice has not been given as hereinbefore provided.

ARTICLE VI.

Waiver of Notice.

Notice of any Shareholders' Meeting may be waived by any Shareholder and the presence at any meeting, either in person or by proxy, of a Shareholder having voting power in respect of the business to be transacted thereat shall be deemed as to such Shareholder a waiver of notice of the meeting.

ARTICLE VII.

Quorum.

At any meeting of the Shareholders, a majority of the shares of capital stock issued and outstanding and entitled to vote in respect of the business to be transacted thereat, represented by such Shareholders of record in person or by proxy, shall constitute a quorum, but a less interest may adjourn any meeting from time to time and the same shall be held as adjourned without further notice. When a quorum is present at any meeting, the vote of the holders of a majority of the shares of capital stock entitled to vote represented thereat shall decide all questions brought before such meeting, unless the question is one upon which by express provision of law or of the Articles of Incorporation of the Corporation or of these Bylaws a larger or different vote is required, in which case such express provision shall govern and control the decision of such question. The provisions of this Article are, however, subject to the provisions of Paragraph 6 of Article VI of the Articles of Incorporation of the Corporation as amended.

ARTICLE VIII.

Proxy and Voting.

The voting power of the respective classes of stock of the Corporation shall be as provided in Article VI of the

Articles of Incorporation of the Corporation as amended. Shareholders of record entitled to vote may vote at any meeting either in person or by proxy in writing, which shall be filed with the Secretary of the meeting before being voted. Such proxies shall entitle the holders thereof to vote at any adjournment of such meeting, but shall not be valid after the final adjournment thereof or after eleven (11) months from the date of its execution unless otherwise provided in the proxy. Each holder of record of stock of the Corporation of any class shall, as to all matters in respect of which such class of stock has voting power, be entitled to one vote for each share of stock of such class standing in his name on the books of the Corporation. R 17

ARTICLE IX.

Board of Directors.

A Board of fourteen (14) Directors shall be chosen by ballot at the Annual Meeting of the Shareholders or at any meeting held in place thereof as hereinbefore provided. The number of Directors may be increased or decreased from time to time by amendment of the Bylaws, but no decrease shall have the effect of shortening the term of any incumbent Director. Any directorship to be filled by reason of an increase in the number of Directors shall be filled by election at an Annual Meeting or at a Special Meeting of Shareholders called for that purpose. Each Director shall serve until the next Annual Meeting and until his successor is duly elected and qualified except as in these Bylaws may otherwise be provided. Directors need not be Shareholders in the Corporation.

No person shall be eligible for election or re-election as a Director of the Company after attaining age 70. Any Director, other than a principal executive officer who serves as such to age 65, who is also a salaried officer or employee and who retires from active employment by the Company shall, concurrently with such retirement, resign as a Director of the Company but shall not be ineligible for re-election thereafter at an Annual Meeting of the Shareholders or at any meeting held in place thereof as hereinbefore provided. Upon retirement from active employment by the Company at or after age 65, the principal executive officer shall be eligible for re-election as a Director until attaining age 70, provided, however, that he shall resign as a Director upon the retirement of any succeeding principal executive officer who then continues to serve as a Director after retirement from active employment by the Company at or after age 65.

Upon termination of service as a Director, any Director of the Company who has served as such to age 70 and any former principal executive officer of the Company who has served as

such to age 65, at the pleasure of the Board of Directors may have the status of Advisory Director, if such person shall have served as a Director continuously for at least ten years immediately prior to ceasing to serve as a Director. At the pleasure of the Board of Directors, each Advisory Director shall have the privilege of attending meetings of the Board of Directors in a consultative capacity, but notice of meetings to an Advisory Director shall not be considered required under the law, the Articles of Incorporation or these Bylaws. No Advisory Director shall be entitled to vote on any business coming before the Board of Directors, nor shall any Advisory Director be counted as a member of the Board of Directors for the purpose of determining whether a quorum is present, or for any other purpose whatsoever. Each Advisory Director shall be entitled to receive the same fees paid to the members of the Board of Directors who are not salaried Officers, but fees to Advisory Directors may be changed or eliminated at any time by amendment of these Bylaws.

The foregoing provisions are, however, subject to Paragraph 6 of Article VI of the Articles of Incorporation of the Corporation as amended.

ARTICLE X.

Powers of Directors.

The Board of Directors shall have the entire management of the business of the Corporation. In the management and control of the property, business and affairs of the Corporation, the Board of Directors is hereby vested with all the powers possessed by the Corporation itself, so far as this delegation of authority is not inconsistent with the laws of the State of Texas, with the Articles of Incorporation of the Corporation or with these Bylaws. The Board of Directors shall have power to determine what constitutes net earnings, profits and surplus, respectively, what amount shall be reserved for working capital and for any other purposes, and what amount shall be declared as dividends, and such determination of the Board of Directors shall be final and conclusive.

ARTICLE XI.

Fees of Directors and Others.

The Board of Directors shall have power to fix and determine the fee or fees to be paid members of the Board of Directors or any Committees appointed by the Directors or Shareholders for attendance at meetings of said Directors or Committees. Any fees so fixed and determined by the Board of Directors shall be subject to revision or amendment by the Shareholders.

ARTICLE XII.

Executive and Other Committees.

The Board of Directors, by resolution adopted by a majority of the number of Directors fixed by the Bylaws, may elect from its number an Executive Committee of not less than three nor more than five members, which Committee may exercise the powers of the Board of Directors in the management of the business of the Corporation when the Board is not in session except where action of the Board of Directors is specified or required by law. The Executive Committee shall report its actions to the Board for approval. The Executive Committee may make rules for the notice, holding and conduct of its meetings and the keeping of the records thereof.

The Board of Directors may likewise appoint from its number or from the Sharcholders other Committees from time to time, the number composing such Committees and the powers conferred upon the same to be determined by vote of the Board of Directors

ARTICLE XIII.

Meetings.

Regular Meetings of the Board of Directors shall be held at such places within or without the State of Texas and at such times as the Board by vote may determine from time to time, and if so determined no notice thereof need be given. Special Meetings of the Board of Directors may be held at any time or place, either within or without the State of Texas, whenever called by the Chairman of the Board of Directors, the President, a Vice President, the Secretary, an Assistant Secretary or three or more Directors, notice thereof being given to each Director by the Secretary or an Assistant Secretary or officer calling the meeting, or at any time without formal notice provided all the Directors are present or those not present have waived notice thereof. Notice of Special Meetings, stating the time and place thereof, shall be given by mailing the same to each Director at his residence or business address at least two days before the meeting or by delivering the same to him personally or by telephoning or telegraphing the same to him at his residence or business address at least one day before the meeting.

ARTICLE XIV.

Quorum.

A majority of the Board of Directors shall constitute a quorum for the transaction of business, but a less number may adjourn any meeting from time to time and the same may

be held without further notice. When a quorum is present at any meeting, a majority vote of the members in attendance thereat shall decide any question brought before such meeting, except as otherwise provided by law or by these Bylaws.

ARTICLE XV.

Officers.

The officers of this Corporation shall be a Chairman of the Board of Directors, a President, one or more Vice Presidents, a Secretary and a Treasurer and such other officers and assistant officers as are permitted or provided by these Bylaws and appointed by the Board of Directors. The officers shall be elected by the Board of Directors after its election by the Shareholders, and a meeting may be held without notice for this purpose immediately after the Annual Meeting of the Shareholders and at the same place.

ARTICLE XVI.

Eligibility of Officers.

The Chairman of the Board of Directors and the President may be, but need not be, Shareholders and shall be Directors of the Corporation. The Vice Presidents, Secretary, Treasurer and such other officers as may be appointed may be, but need not be, Shareholders or Directors of the Corporation. Any person may hold more than one office provided the duties thereof can be consistently performed by the same person, and except that the President and Secretary shall not be the same person.

ARTICLE XVII.

Additional Officers and Agents.

The Board of Directors in its discretion may appoint one or more Assistant Secretaries, one or more Assistant Treasurers, and such other officers or agents as it may deem advisable, and prescribe the duties thereof.

ARTICLE XVIII.

Chairman of the Board of Directors and President.

The Chairman of the Board of Directors shall be elected from among the Directors of this Corporation. He may call meetings of the Board of Directors and of any committee thereof whenever he deems it necessary. When present, he shall call to order and preside at all meetings of the Shareholders of this Corporation and of the Board of Directors. He shall be the

principal executive officer of this Corporation and shall have general supervision over the business and policies of this Corporation, subject to the control of the Board of Directors. He shall perform such other duties and have such other powers as the Board of Directors shall designate from time to time.

The President shall be elected from among the Directors of this Corporation. In the absence of the Chairman of the Board, the President shall perform the duties of such Chairman. The President shall be the managing executive officer of this Corporation and shall perform all the duties commonly incident to his office and such other duties as the Board of Directors shall designate from time to time. The President or a Vice President, unless some other person is thereunto specifically authorized by vote of the Board of Directors, shall sign all bonds, deeds and contracts of this Corporation. The President or a Vice President shall sign all certificates representing shares of stock in this Corporation to which Shareholders are entitled.

ARTICLE XIX.

Vice Presidents.

Except as especially limited by vote of the Board of Directors, any Vice President shall perform the duties and have the powers of the President during the absence or disability of the President, and shall have the power to sign all certificates of stock, bonds, deeds, and contracts of the Corporation. He shall perform such other duties and have such other powers as the Board of Directors, the Chairman of the Board of Directors, or the President shall designate from time to time. From time to time, as it may determine advisable, the Board of Directors may designate an Executive Vice President who, in the absence or disability of the President, shall be the managing executive officer of this Corporation. The Executive Vice President shall possess all the powers conferred by these Bylaws on other Vice Presidents and shall perform such other duties and have such other powers as the Board of Directors, the Chairman of the Board of Directors, or the President may designate from time to time.

ARTICLE XX.

Secretary.

The Secretary shall keep accurate minutes of all meetings of the Shareholders, the Board of Directors and the Executive or other committees of the Board of Directors, respectively, shall perform all the duties commonly incident to his office, and shall perform such other duties and have such other powers as the Board of Directors shall designate from time to time. The Secretary shall have the power, together with the President or a Vice President, to sign certificates of Stock of the Corporation. In his absence an Assistant Secretary or a Secretary pro tempore shall perform his duties. The Secretary, any Assistant Secretary and any Secretary pro tempore shall be sworn to the faithful discharge of their duties.

ARTICLE XXI.

Treasurer.

The Treasurer, subject to the order of the Board of Directors, shall have the care and custody of the money, funds and securities owned or possessed by the Corporation and shall have and exercise, under the supervision of the Board of Directors, all the powers and duties commonly incident to his office, and shall give bond (which shall be in the custody of the President) in such form and with such sureties as shall be required by the Board of Directors. He shall deposit all funds of the Corporation in such bank or banks, trust company or trust companies or with such firm or firms doing a banking business as the Directors shall designate. He may endorse for deposit or collection all checks, notes, et cetera, payable to the Corporation or to its order, and may accept drafts on behalf of the Corporation. He shall keep accurate books of account of the Corporation's transactions which shall be the property of the Corporation, and, together with all its property in his possession, shall be subject at all times to the inspection and control of the Board of Directors.

All checks, drafts, notes, and other obligations for the payment of money except bonds, debentures and notes issued under an Indenture (with the exception of checks in payment of dividends of this Company drawn on accounts designated "Dividend Accounts" which shall be signed in the manner authorized by the Board of Directors) shall be signed, either manually or, if and to the extent authorized by the Board of Directors, through facsimile, by the Treasurer or an Assistant Treasurer or such other officer or agent as the Board of Directors shall authorize and, with the exception of checks in payment of not more than $1,000, shall also be signed or countersigned as a condition to their validity by the President, a Vice President or such other officer or agent as the Board of Directors shall authorize; provided, however, that if the Treasurer causes checks to be drawn in accordance with the foregoing provisions and deposited in special funds to provide for the payment of any payroll or for the payment of charges for transportation by common carrier, checks drawn upon such special funds may be signed manually by such person or persons as the Treasurer shall designate, or, if and to the extent authorized by the Board of Directors, through facsimile, and need not be countersigned.

ARTICLE XXII.

Removals.

The Shareholders may, at any meeting called for the purpose, by a vote of a majority of the shares of the capital

stock issued and outstanding and entitled to vote, remove from office any Director or other officer elected or appointed by the Shareholders or Board of Directors and elect or appoint his successor, but this provision is subject to Paragraph 6 of Article VI of the Articles of Incorporation of the Corporation as amended. The Directors may, by vote of not less than a majority of the entire Board, remove from office any officer or agent or member or members of any Committees selected or appointed by them or by the Executive Committee.

ARTICLE XXIII.

Vacancies.

Any vacancy occurring in the Board of Directors (other than a vacancy created by an increase in the number of Directors, which is governed by Article IX of these Bylaws) may be filled for the unexpired term by the affirmative vote of a majority of the remaining Directors though less than a quorum of the Board of Directors, but vacancies in the Board of Directors may be filled for the unexpired term by the Shareholders having voting power at a meeting called for that purpose, unless such vacancy shall have been filled by the Directors.

If the office of any officer or agent, one or more, becomes vacant by reason of death, resignation, removal, disqualification or otherwise, the Directors may, by a majority vote, choose a successor or successors who shall hold office for the unexpired term. The foregoing provisions are, however, subject to Paragraph 6 of Article VI of the Articles of Incorporation of the Corporation as amended.

ARTICLE XXIV.

Capital Stock.

The amount of capital stock, and of each class thereof, shall be as fixed in the Articles of Incorporation or in any lawful amendments thereto and the votes of the Corporation from time to time.

ARTICLE XXV.

Certificates of Stock.

Every Shareholder shall be entitled to a certificate or certificates representing shares of the capital stock of the Corporation in such form, complying with law as may be prescribed by the Board of Directors, duly numbered and sealed with the corporate seal of the Corporation and setting forth the number and kind of shares to which such Shareholder is

entitled. Such certificates shall be signed by the President or a Vice President and by the Secretary or an Assistant Secretary. The Board of Directors may also appoint one or more Transfer Agents and/or Registrars for its stock of any class or classes and may require stock certificates to be countersigned by one or more of them. If certificates representing shares of capital stock of this Corporation are signed by a Transfer Agent and by a Registrar, the signatures thereon of the President or a Vice President and the Secretary or an Assistant Secretary of this Corporation, may be facsimiles, engraved or printed. Any provisions of these Bylaws with reference to the signing of stock certificates shall include, in cases above permitted, such facsimile signatures. In case any officer or officers who shall have signed, or whose facsimile signature or signatures shall have been used on, any such certificate or certificates, shall cease to be such officer or officers of this Corporation, whether because of death, resignation or otherwise, before such certificate or certificates shall have been delivered by this Corporation, such certificate or certificates may nevertheless be adopted by the Board of Directors of this Corporation and be issued and delivered as though the person or persons who signed such certificate or certificates or whose facsimile signature or signatures shall have been used thereon had not ceased to be such officer or officers of this Corporation. Any stock certificates bearing facsimile signatures of officers of this Corporation, as above provided, may also bear a facsimile of the seal of this Corporation.

ARTICLE XXVI.

Transfer of Stock.

Shares of stock may be transferred by delivery of the certificate accompanied either by an assignment in writing on the back of the certificate or by a written power of attorney to sell, assign and transfer the same signed by the person appearing by the certificate to be the owner of the shares represented thereby. No transfer shall affect the right of the Corporation to pay any dividend due upon the stock, or to treat the holder of record as the holder in fact, until such transfer is recorded upon the books of the Corporation or a new certificate is issued to the person to whom it has been so transferred. It shall be the duty of every Shareholder to notify the Corporation of his post office address.

ARTICLE XXVII.

Transfer Books.

The Board of Directors shall have power to close the stock transfer books of this Corporation for a period not

exceeding 50 days preceding the date of any meeting of shareholders or the date for payment of any dividend or the date for the allotment of rights or the date when any change or conversion or exchange of capital stock shall go into effect; provided, however, that in lieu of closing the stock transfer books as aforesaid, the Board of Directors may fix in advance a date, not exceeding 50 days preceding the date of any meeting of shareholders or the date for the payment of any dividend, or the date for the allotment of rights, or the date when any change or conversion or exchange of capital stock shall go into effect, as a record date for the determination of the shareholders entitled to notice of, and to vote at, any such meeting and any adjournment thereof, or entitled to receive payment of any such dividend, or to any such allotment of rights, or to exercise the rights in respect of any such change, conversion or exchange of capital stock, and in such case only such shareholders as shall be shareholders of record on the date so fixed shall be entitled to such notice of, and to vote at, such meeting and any adjournment thereof, or to receive payment of such dividend, or to receive such allotment of rights, or to exercise such rights, as the case may be, notwithstanding any transfer of any stock on the books of this Corporation after any such record date fixed as aforesaid.

ARTICLE XXVIII.

Loss of Certificates.

In case of the loss, mutilation or destruction of a certificate representing shares of stock, a duplicate certificate may be issued upon such terms as the Board of Directors may prescribe.

ARTICLE XXIX.

Seal.

The seal of this Corporation shall consist of a flat-faced circular die with the words and figures "GULF STATES UTILITIES COMPANY CORPORATE SEAL 1925 TEXAS" cut or engraved thereon.

ARTICLE XXX.

Books and Records.

Unless otherwise expressly required by the laws of the State of Texas, the books and the records of the Corporation may be kept outside of the State of Texas at such place or places as may be designated from time to time by the Board of Directors.

R 26

ARTICLE XXXI.

Amendments.

These Bylaws may be amended, added to, altered or repealed by the Board of Directors of the Company. In the event of any such amendment, alteration or repeal of these bylaws by the Board of Directors, the notice of the Annual Meeting of the Shareholders which shall thereafter first be sent to the Shareholders shall state that the Bylaws have been so amended, added to, altered or repealed and shall describe or set forth or be accompanied by statement describing or setting forth such amendment, addition, alteration or the text of any article which has been repealed. Notwithstanding anything hereinabove contained, these Bylaws may be amended, added to, altered or repealed at any Annual or Special Meeting of the Shareholders by vote in either case of a majority of the voting power of the shares of the capital stock issued and outstanding and entitled to vote in respect thereof, unless the question is one upon which by express provisions of law or of the Articles of Incorporation or of these Bylaws a larger or different vote is required, in which case such express provision shall govern and control the decision of such question, provided, however, that notice is given in the call of said meeting that an amendment, addition, alteration or repeal is to be acted upon.

R 27

EXHIBIT D
(FPC)

GULF STATES UTILITIES COMPANY

Draft of proposed resolutions of the board of directors of Gulf States Utilities Company authorizing the issue and sale of $30,000,000 Principal Amount of First Mortgage Bonds, _____% Series A due 2000.

"RESOLVED, that this Company accept the bid, submitted on the Form of Bid supplied by the Company, of _____ _____, as representative of the several purchasers named in Exhibit A to said Form of Bid, to purchase severally and not jointly for the accounts of such purchasers the principal amount of First Mortgage Bonds, _____% Series A due 2000 of this Company, set forth opposite their respective names in said Exhibit A (adjusted, if necessary in compliance with Section 3 of the Public Invitation for Bids) aggregating $30,000,000 principal amount, at a price of _____% of the principal amount thereof, plus accrued interest thereon from December 1, 1970 to the date of delivery thereof; whereupon, such bid and the Terms of Purchase annexed to said Form of Bid as Exhibit B and setting forth the terms and conditions upon which the Company is to sell and said purchasers are to purchase said $30,000,000 principal amount of bonds upon acceptance of the aforesaid bid, shall become effective and collectively constitute the Bond Purchase Contract, as set forth in Section 8 of the Public Invitation for Bids and in Paragraph 4 of said Form of Bid, between the Company and said purchasers with regard to the aforesaid sale and purchase of $30,000,000 principal amount of bonds of the Company.

RESOLVED, that the president, any vice president, or the secretary of this Company be and he hereby is authorized and directed to execute the acceptance of the bid referred to in the preceding resolution, whereupon such bid and the Terms of Purchase annexed thereto as Exhibit B, collectively constituting the Bond Purchase Contract, shall become effective as set forth in the preceding resolution.

RESOLVED, that the proper officers of this Company be and they hereby are authorized and directed to take all such action as may be necessary or desirable in order to carry out the intent and purpose of the two foregoing resolutions."

R 28

RESOLVED, that, subject to any necessary action by the Federal ... Commission and Securities and Exchange Commission, this Company ... sell and deliver the bonds to the several purchasers thereof ... in Exhibit A to said Form of Bid dated December 9, 1970, here... at this meeting authorized to be accepted, in accordance with ... terms thereof and upon receipt from such purchasers of the afore... price for said bonds; and the proper officers of this Company be ... they hereby are authorized, empowered and directed to take any and ... such action and to do any and all such things as may be deemed by ... officers or any one or more of them to be necessary or desirable ... effectuate and carry out the terms and provisions of these resolutions ... the Bond Purchase Contract, in accordance with the terms thereof."

EXHIBIT E
(FPC)

R 29

GULF STATES UTILITIES COMPANY

The Names, Titles and Addresses of
Principal Officers of Applicant

Name	Title	Address
[illegible] R. Smith	President and Principal Executive Officer	P. O. Box [illegible] Beaumont, Texas [illegible]
[illegible] L. Adams	Senior Vice President	P. O. Box [illegible] Beaumont, Texas [illegible]
[illegible]rman R. Lee	Senior Vice President	P. O. Box 2951 Beaumont, Texas 77704
[illegible]lonel V. Dugas	Vice President	P. O. Box 2951 Beaumont, Texas 77704
[illegible]rold E. Mortimer	Vice President	P. O. Box 2951 Beaumont, Texas 77704
[illegible]seph R. Murphy	Vice President	P. O. Box 2431 Baton Rouge, Louisiana 70821
[illegible]erome M. Stokes	Vice President-Finance and Secretary	P. O. Box 2951 Beaumont, Texas 77704
[illegible]dgar L. Bailey	Treasurer	P. O. Box 2951 Beaumont, Texas 77704

CERTIFIED AS CORRECT:

By _____
J. M. Stokes
Vice President-Finance
and Secretary

[illegible] 21 1970

ORGAIN, B... ...OCKER
ATTOR... ...LAW...
BEA... ...TEXAS

EXHIBIT ... R 30
(FPC)

October 9, 1970

Gulf States Utilities Company
285 Liberty Avenue
Beaumont, Texas 77701

Gentlemen:

Application to the Federal Power Commission for
Authorization of the Issuance of
First Mortgage Bonds

Reference is made to the Application of your Company (hereinafter called the "Company") under Section 204(a) of the Federal Power Act which is to be filed with the Federal Power Commission for authorization of the issuance of $30,000,000 principal amount of First Mortgage Bonds, ____% Series A due 2000 (hereinafter called "Bonds"). The Bonds are to be issued pursuant to a Twenty-ninth Supplemental Indenture to the Indenture of Mortgage dated September 1, 1926, as heretofore supplemented and modified (hereinafter called the "Indenture").

We understand that the Company will file a Registration Statement with the Securities and Exchange Commission, that the Company expects the Registration Statement to become effective for the purpose of the invitation for bids for the purchase of the Bonds, and that after bids are received, the Company proposes to execute an acceptance of the Bid submitted by the successful bidder or bidders for the Bonds, and to file a Post-Effective Amendment to the Registration Statement, which will name the Underwriters of the Bonds, fix the interest rate to be borne by the Bonds, the designation of the Series, the price to the Company for the Bonds, the public offering price thereof, if any, and otherwise complete said Registration Statement for the purpose of the public offering.

We also understand that the Company proposes to use the proceeds from the issuance of such Bonds for proper corporate purposes, namely, the

purposes set forth in response to Item 7 of the aforesaid Application, and which are necessary, appropriate and consistent with the proper performance by the Company of services as a public utility.

Relying, as to matters of Louisiana law, upon the opinion of Messrs. Taylor, Porter, Brooks & Phillips of even date herewith, we, as Counsel for the Company, advise as follows:

1. The Company was duly incorporated and now is a validly existing corporation under the laws of the State of Texas, and has full power and authority under the laws of said State and of the State of Louisiana to hold and operate the properties described in the aforesaid Application.

2. When the requisite authorization has been obtained from the Federal Power Commission and the Registration Statement, which will be filed with the Securities and Exchange Commission, has by such Commission been permitted to become effective, no other action, consent or approval of any Governmental authority (other than in connection or in compliance with the provisions of Securities or Blue Sky laws) will be requisite to the legal creation, issuance and delivery of the Bonds described in the aforesaid application to the Federal Power Commission; and other than the usual filing fees, there are no taxes or fees payable in the State of Texas or in the State of Louisiana in connection with the creation of said Bonds, or their initial issuance.

3. When the requirements of the regulatory bodies above referred to shall have been satisfied, the Board of Directors of the Company shall have taken action (in the form which we have examined and approved) authorizing the issuance and sale of said Bonds, the Twenty-ninth Supplemental Indenture, supplementing the Indenture, shall have been executed, and the Bonds have been issued and sold in accordance with the corporate and Governmental authorization aforesaid, said Bonds will have been properly issued and will, in the hands of the holders thereof, be valid and legal outstanding obligations of the Company, secured by the aforesaid Indenture as amended and modified.

The State of Texas has no utility regulatory body with jurisdiction over the issuance of securities of the Company and no other Federal or

COPY

ORGAIN, BELL & TUCKER
ATTORNEYS AT LAW
BEAUMONT, TEXAS
77701

R 32

...States Utilities Company
...n 3

...state regulatory body has jurisdiction over the issuance of the Bonds for the issuance of which you have filed the aforesaid Application to the Federal Power Commission. The issuance of said securities, for the approval of which you have made such Application, will not impair the Company's ability to perform services as a public utility.

We hereby consent to be named in the aforesaid Application to the Federal Power Commission as Counsel for the Company, to the making of the statements set forth in Items "M", "N" and "O" of your said Application, and to the filing of this opinion as an exhibit to said Application.

Very truly yours,

Orgain, Bell & Tucker

ORGAIN, BELL & TUCKER

BDO/k

EXHIBIT F-2
(FPC)

TAYLOR, PORTER, BROOKS & PHILLIPS
ATTORNEYS AT LAW
LOUISIANA NATIONAL BANK BUILDING
POST OFFICE BOX 2471
BATON ROUGE, LOUISIANA 70821
TELEPHONE (504) 348-3221

BENJAMIN B. TAYLOR (1885-1959)
CHARLES VERNON PORTER (1885-1957)
WILLIAM G. RANDOLPH
OF COUNSEL

October 9, 1970

Oct 12 9 17 AM '70
FEDERAL POWER COMMISSION

Gulf States Utilities Company
285 Liberty Avenue
Beaumont, Texas 77701

Gentlemen: APPLICATION TO THE FEDERAL POWER COMMISSION FOR AUTHORIZATION OF THE ISSUANCE OF FIRST MORTGAGE BONDS

Reference is made to the application of your Company (hereinafter sometimes called the "Company") under Section 204(a) of the Federal Power Act, which is to be filed with the Federal Power Commission for authorization of the issuance of $30,000,000 principal amount of First Mortgage Bonds, _____% Series A due 2000 (hereinafter called "Bonds"). The Bonds are to be issued pursuant to a Twenty-ninth Supplemental Indenture to the Indenture of Mortgage dated September 1, 1926, as heretofore supplemented and modified.

We understand that the Company will file a Registration Statement with the Securities and Exchange Commission, that the Company expects the Registration Statement to become effective for the purpose of the invitation for bids for the purchase of the Bonds, and that after bids are received, the Company proposes to execute an acceptance of the bid submitted by the successful bidder or bidders for the Bonds, and file a Post-Effective Amendment to the Registration Statement, which will name the Underwriters of the Bonds, fix the interest rate to be borne by the Bonds, the designation of the Series, the price to the Company for the Bonds, the public offering price thereof, if any, and otherwise complete said Registration Statement for the purpose of the public offering.

As Counsel for the Company, we advise you that the Company is duly qualified to carry on business as a foreign corporation in the State of Louisiana, and

R 34

neither the Louisiana Public Service Commission nor any other Governmental authority in the State of Louisiana has any jurisdiction over the issuance of securities by the Company (other than in connection with or in compliance with the provisions of the Securities or Blue Sky Laws).

We hereby consent to be named in the aforesaid Application to the Federal Power Commission as Counsel for the Company, to the making of the statements set forth in Items "M", "N", and "O", insofar as same relate to matters of Louisiana law, and to the filing of this opinion as an exhibit to your said Application.

Yours very truly,

Taylor Porter Brooks & Phillips

TAYLOR, PORTER, BROOKS AND PHILLIPS

R 35

EXHIBIT G
(FPC)

GULF STATES UTILITIES COMPANY

Statement as of August 31, 1970 of
the Measure of Control or Ownership
Exercised By or Over the Company

No person, firm or corporation holds as much as 10% of the total issued and outstanding shares of the capital stock of the Company having voting privileges.

The Company is not a member of a holding company system and has no intercorporate relationships except the ownership by it of all of the outstanding stock of its subsidiary, Varibus Corporation, a Texas corporation. Such subsidiary is not a public utility, bank, trust company, banking association, underwriter or participant in the marketing of securities of a public utility, or supplier of electric equipment to the Company.

CERTIFIED AS CORRECT:

By J. M. Stokes
Vice President-Finance
and Secretary

GULF STATES UTILITIES COMPANY
BALANCE SHEET
August 31, 1970 and Pro forma

	Assets and Other Debits	Before Transaction Actual
	UTILITY AND OTHER PLANT	
101, 105, 107 & 118	Utility and other plant	$1,050,447,392
	Less Accumulated provision for depreciation Accounts 108 and 119	(200,836,588)
	Total utility and other plant less accumulated provision for depreciation	849,610,804
	OTHER PROPERTY AND INVESTMENTS	
121	Nonutility property, at cost	750,872
123	Investments in Associated Companies	100,000
124	Other investments, at cost	322,548
	Total other property and investments	1,173,420
	CURRENT AND ACCRUED ASSETS	
131	Cash	5,168,799
134	Other special deposits	2,360,487
135	Working funds	165,395
	Receivables:	
142 & 143	Customer and other accounts receivable	25,358,742
	Total receivables	25,358,742
	Less Accumulated provision for uncollectible Account 144	(280,031)
	Net receivables	25,078,711
151-159, & 163	Materials and supplies	5,657,582
165	Prepayments	2,856,398
	Total current and accrued assets	41,287,372
	DEFERRED DEBITS	
181	Unamortized debt discount and expense	434,911
183	Preliminary survey and investigation charges	228,794
184	Clearing accounts	(4,512)
186	Miscellaneous deferred debits	1,762,741
	Total deferred debits	2,421,934
	Total assets and other debits	$ 894,493,530

The appended notes are an integral part of this balance sheet.
(1 thru 4) - See adjustments on Exhibit H, Pages 6 and 7.

BALANCE SHEET
of August 31, 1970 and Pro forma
(Continued)

	Liabilities and Other Credits	Before Transacti Actual
	PROPRIETARY CAPITAL	
201	Common stock issued	$147,299,7
204	Preferred stock issued	82,500,0
207	Premium on capital stock	600,2
215	Unappropriated retained earnings (Note A)	109,934,5
	Total proprietary capital	340,334,5
	LONG-TERM DEBT	
221	Bonds (Notes B & C)	416,000,0
	Less: Reacquired bonds Account 222 (Note C)	(375,0
	Total long-term debt	415,625,0
	CURRENT AND ACCRUED LIABILITIES	
231	Notes payable	39,460,6
232	Accounts payable	6,883,7
235	Customers' deposits	1,507,6
236	Taxes accrued	14,588,7
237	Interest accrued	4,409,6
238	Dividends declared	6,672,3
241	Tax collections payable	(37,4
242	Miscellaneous current and accrued liabilities	3,113,4
	Total current and accrued liabilities	76,598,3
	DEFERRED CREDITS	
251	Unamortized premium on debt	1,312,8
252	Customers' advances for construction	45,6
255	Accumulated deferred investment tax credit (Note D)	12,362,3
253	Other deferred credits	195,4
	Total deferred credits	13,916,3
	OPERATING RESERVES	
261	Property insurance reserve	1,334,0
262	Injuries and damages reserve	223,0
	Total operating reserves	1,557,0
	CONTRIBUTIONS IN AID OF CONSTRUCTION	
271	Contributions in aid of construction	2,330,8
	Total contributions in aid of construction	2,330,8
	ACCUMULATED DEFERRED INCOME TAXES (Note E)	
281	Accumulated deferred income taxes -	
282	Accelerated amortization	3,932,0
	Accumulated deferred income taxes -	
	Liberalized depreciation	40,148,8
	Total accumulated deferred income taxes	44,080,9
	Total liabilities and other credits	$894,493,5

The appended notes are an integral part of this balance sheet.
(1 thru 4) - See adjustments on Exhibit H, Pages 6 and 7.

EXHIBIT H
Page 3

R38

GULF STATES UTILITIES COMPANY
CLASSIFICATION OF UTILITY AND OTHER PLANT
AS OF AUGUST 31, 1970

Description	Amount
Electric Plant:	
Electric Plant in Service:	
Intangible Plant	$ 13,104
Steam Production Plant	276,70[illegible],560
Transmission Plant	218,514,269
Distribution Plant	247,34[illegible],515
General Plant	19,[illegible]1,130
Total Electric Plant in Service	762,41[illegible],574
Electric Plant Held for Future Use	803,818
Construction Work in Progress	217,7[illegible],686
Total Electric Plant	$ 981,013,378
Steam Products Plant:	
Steam Products Plant in Service:	
Production Plant	$ 47,833,027
Distribution Plant	3,600,260
General Plant	40,366
Total Steam Products Plant in Service	51,473,653
Construction Work in Progress	610,757
Total Steam Products Plant	$ 52,084,410
Gas Plant:	
Gas Plant in Service:	
Intangible Plant	$ 103,164
Distribution Plant	17,011,686
General Plant	156,840
Total Gas Plant in Service	17,271,690
Construction Work in Progress	77,914
Total Gas Plant	$ 17,349,604
Total Utility and Other Plant	$1,050,447,392

Note:
Cost of jointly used facilities is included in the plant account of the department on the basis of predominant use.

EXHIBIT F
Page 4

GULF STATES UTILITIES COMPANY
CLASSIFICATION OF ACCUMULATED PROVISION
FOR DEPRECIATION APPLICABLE
TO UTILITY AND OTHER PLANT
AS OF AUGUST 31, 1970

Description		Amount
Accumulated provision for depreciation of electric plant		$169,241,257
Accumulated provision for depreciation applicable to other plant:		
Steam products department	$27,280,351	
Gas department	4,314,980	31,595,331
Total accumulated provision for depreciation applicable to utility and other plant		$200,836,588

Note:
Cost of jointly used facilities and the related accumulated provision for depreciation are included in the department on the basis of predominant use.

GULF STATES UTILITIES COMPANY
NOTES TO BALANCE SHEET

(a) Under restrictions imposed by the Company's Articles of Incorporation, unappropriated retained earnings unrestricted as to payment of cash dividends on common stock amounted to $77,964,114 at August 31, 1970.

(b) Excludes $1,000,000 principal amount 2-5/8% bonds, nominally issued and held in Treasury.

(c) The Debentures bear interest at 4-5/8% and are due October 1, 1981. The Trust Indenture requires annual redemption of $375,000 principal amount through 1980.

(d) Amounts equal to the reductions in Federal income taxes resulting from investment tax credits are being charged to income and concurrently credited to deferred credits. The Company is amortizing the deferred credits over the useful lives of the related properties.

(e) The Company has amortized, for Federal income tax purposes, $16,300,191 of the cost of certain facilities and also has adopted accelerated methods of computing depreciation for Federal income tax purposes for eligible property additions. Pursuant to Regulatory Commission order, amounts equal to the reductions in tax are being charged to income and concurrently credited to accumulated deferred Federal income taxes. Under such order, upon expiration of the periods of tax deferment, the amounts accumulated are being used to offset the provision for Federal income taxes in amounts equivalent to the related increases in such taxes.

GULF STATES UTILITIES COMPANY
ADJUSTMENTS TO BALANCE SHEET
Adjustments to Actual Before Proposed Transactions

EXHIBIT H
Page 6 R 4

(1)

Dividends declared	$ 6,672,359	
Cr: Cash		$ 6,672,359

To record the payment of quarterly dividends on September 15, 1970.

(2)

Cash	$15,539,399	
Cr: Notes Payable		$15,539,399

To record the issuance of unsecured short-term notes and commercial paper in the aggregate net principal amount of $15,539,399 between the period of December 1, 1970, and December 16, 1970, immediately prior to the sale.

GULF STATES UTILITIES COMPANY
ADJUSTMENTS TO BALANCE SHEET
Adjustments to Record Proposed Transactions
(Continued)

(3)

Dr: Cash	$30,000,000	
Cr: Long-Term Debt - Bonds		$30,000,000

To record the issuance of $30,000,000 principal amount of New Bonds based upon the assumed net proceeds from the sale. The estimated premium to be received, if any, and the estimated expenses to be incurred cannot now be determined.

(4)

Dr: Notes Payable	$30,000,000	
Cr: Cash		$30,000,000

To record the payment of $30,000,000 principal amount of unsecured short-term notes and/or commercial paper, representing a portion of the $55,000,000 short-term instruments estimated to be outstanding immediately prior to the proposed transactions by use of proceeds from the sale of the New Bonds.

R54

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL POWER COMMISSION

Gulf States Utilities Company	)	Docket No. E-7567

PROTEST AND PETITION TO INTERVENE
BY CITIES OF LAFAYETTE AND PLAQUEMINE, LOUISIANA

The Cities of Lafayette and Plaquemine, Louisiana, ("The Cities") hereby (i) protest the application of Gulf States Utilities Company ("Gulf States") filed October 12, 1970 for an order authorizing the issuance of $30,000,000 principal amount First Mortgage Bonds due in the year 2000; (ii) petition to intervene as a party in this matter; and (iii) request formal hearings.

I

The names of the petitioners are the Cities of Lafayette, Louisiana, and Plaquemine, Louisiana.

II

The names, titles and addresses of the persons to whom communications concerning this petition should be addressed are:

George Spiegel, Esq.
Robert C. McDiarmid, Esq.
Counsel for Petitioners
2600 Virginia Avenue, N.W.
Washington, D. C. 20037

James W. Bean, Esq.
City Attorney
P. O. Box 2336
Lafayette, Louisiana 70501

The Honorable J. Rayburn Bertrand
Office of the Mayor
Lafayette, Louisiana 70501

The Honorable Harry Gallagher
Mayor of the City of Plaquemine
Plaquemine, Louisiana 70764

III

Gulf States has applied, under Section 204 of the Federal Power Act, for authority to issue $30,000,000 principal amount First Mortgage Bonds. Section 204(a), provides:

> "No public utility shall issue any security, or assume any obligation or liability as guarantor, indorser, surety, or otherwise in respect of any security of another person, unless and until, and then only to the extent that, upon application by the public utility, the Commission by order authorizes such issue or assumption of liability. The Commission shall make such order only if it finds that such issue or assumption (a) is for some lawful object, within the corporate purposes of the applicant and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the applicant of service as a public utility and which will not impair its ability to perform that service, and (b) is reasonably necessary or appropriate for such purposes. The provisions of this section shall be effective six months after this Part takes effect."

Section 204(b) provides:

> "The Commission, after opportunity for hearing, may grant any application under this section in whole or in

> part, and with such modifications and upon such terms and conditions as it may find necessary or appropriate, and may from time to time, after opportunity for hearing and for good cause shown, make such supplemental orders in the premises as it may find necessary or appropriate, and may by any such supplemental order modify the provisions of any previous order as to the particular purposes, uses, and extent to which, or the conditions under which, any security so theretofore authorized or the proceeds thereof may be applied, subject always to the requirements of subsection (a) of this section."

Thus, the Commission is empowered to authorize the issuance of securities by a public utility ". . . only if it finds that such issue . . . is for some lawful object . . . and compatible with the public interest, [and] is necessary or appropriate for or consistent with the proper performance by the applicant of service as a public utility . . . ." (Sec. 204 (a)). Moreover, if the Commission finds it appropriate, it may condition its authorization to eliminate unlawful practices of the company or those inconsistent with the public interest.

The Cities view the activities of Gulf States, in concert with Louisiana Power and Light Company (LP&L), a wholly owned subsidiary of Middle South Utilities, Inc., and Central Louisiana Electric Company ("CLECO"), as apparently violative of the anti-trust laws, Section 10h of the Federal Power Act, and the Public Utility Holding Company Act of 1935. These activities, which would, in effect, be financed or refinanced by the bonds here proposed to be issued are, in the view of the Cities, an unlawful object, incompatible

with the public interest, and neither necessary nor appropriate for, nor consistant with, the proper performance by the applicant of service as a public utility. Consequently, the Cities oppose the grant of the requested authorization unless and until Gulf States purges itself of these past violations, or unless the Commission conditions its authorization upon the taking of such actions.

Many of the activities involved have been outlined in testimony given on behalf of the National Rural Electric Cooperative Association to the Senate Antitrust Subcommittee, a copy of which is attached hereto as Appendix A. The Cities, together with Dow Chemical Company ("DOW") and Louisiana Electric Cooperative, Inc. ("LEC"), a generation and transmission cooperative financed by the Rural Electrification Administration, executed an Interconnection and Pooling Agreement dated August 6, 1968 providing for the interconnection of their generating systems and a long-term power pooling and coordination arrangement for a minimum of 10 years. The agreement was approved by the REA Administrator on November 19, 1968 pursuant to the loan contract between LEC and REA. A copy of this pool agreement is attached as Appendix B. Under this program, LEC would construct its first station of 200 MW

and this and future LEC units would be pooled and coordinated with the expansion of the existing generating facilities of the Cities and Dow.

Both Lafayette and Plaquemine have independent generating resources and the executed power pool agreement provides long-term benefits for the economic expansion of their systems and the reliability of their power supplies. Plaquemine is interconnected with LP&L and Lafayette is interconnected with CLECO, but the pool agreement adds important economic benefits not available under the existing interconnection agreements.

Under the proposed pool, there would be coordinated planning for the serving of the load requirements of the LEC members, the Cities and Dow. Each system would be assured of a 4-system market for all its surplus capacity and secondary energy, and agreements would be reached under which individual systems would size and time the construction of new generators in the best interests of the total pool market, although each individual system would remain responsible for providing adequate power supply for its own loads by generation expansion or purchase of power. The pool would provide back-up for each system, and there would be economy energy exchanges among the pool members. The parties to the pool agreement contemplated that the pool could be expanded by the addition of electric companies.

Gulf States, in combination with LP&L and CLECO, which are interconnected with each other, are taking concerted action to extinguish this LEC pool. This is illustrated by their actions in July 1969: The REA Administrator sought to arrange for the use of the companies' transmission lines, as a substitute for the REA-financed transmission lines which, under the pool agreement, will serve the dual functions of transmission of LEC power to its member retail cooperatives and transmission of pool power between pool members. In response, the three companies proposed to supply transmission services to some of the LEC members, but refused to provide transmission between pool members. On the contrary, they stated their demand and condition, that "LEC agrees to take all necessary steps to cancel, extinguish and terminate" the LEC pool agreement. (See proposed Power Sales and Transmission Agreement, 7/17/69, Article XV, Sec. 4, Appendix C hereto). Evidently the companies regarded their demand as being of an actionable nature, because the contract proposal continues as follows:

> "Further, LEC agrees to save and hold the Companies harmless from any claims of whatever nature arising out of or resulting from the aforesaid cancellation, execution and termination of said Pooling and Interchange Agreement."

Thus, for example, were the Companies held liable for treble damages for the extinction of the pool, the Companies in turn would seek to

recover their damages from LEC and LEC might be financially destroyed in the process.

Such destruction of LEC would serve what appears to be a long-range objective of the three companies. This is demonstrated by the history of the extraordinary litigation mounted by the three companies against LEC during the period 1964 through 1970. The history of this litigation is summarized in the testimony of the National Rural Electric Cooperative Association before the Subcommittee on Antitrust and Monopoly, Committee on the Judiciary, U. S. Senate, June 10, 1970, pages 3-7; (Appendix A hereto).

Another example of the tactics used by Gulf States and the other Companies to impede the development of LEC is set forth in a letter to the Federal Power Commission by an attorney, William C. Wise, dated March 24, 1969 (Appendix D hereto). The letter complains in effect that Gulf States was refusing to provide facilities needed to adequately serve one of the LEC member cooperatives unless the cooperative would sign a 10-year contract which would disable it from purchasing power from LEC. The letter points out that (p. 2):

> "Gulf States' representatives have been most candid in admitting that it was exerting every effort to prevent a generation and transmission system being built by Louisiana Electric Cooperative, Inc., of

which the Cooperative is a member, and that it would not cooperate in meeting the needs of the Cooperative until the G&T had been killed."

The July 17, 1969, three-company proposal, discussed above, contained other important restrictions on LEC which would not only block LEC's operation under the pool agreement, but also hamstring LEC itself. The agreement would last until 1992 (Article XIV). LEC's 200 MW steam generating station could supply power to only 4 of its 12 members (Art. I, Sec. 7; Art. II; Exh. A). Any capacity excess to the four selected distributor cooperatives must be sold to the Companies (Art. VI, Sec. 1), thus prohibiting such sale to the Cities or Dow as contemplated by the LEC Pool Agreement. All power and energy required by the four members in excess of LEC's station would be supplied exclusively by the Companies (Art. II). This would accomplish the following: (i) prevent LEC from expanding its plant to serve its members' load; (ii) eliminate the coordination of additional LEC generating units with other members of the LEC Pool; and (iii) remove the LEC member cooperative market from the pool operations, including potential sales by the Cities into this market. The proposed agreement also would give the three companies collectively the exclusive right to transmit LEC power and energy to the member cooperatives, and to allocate that business among themselves.

It would appear that this collective action may violate Section 10h and the antitrust laws in many ways. The Companies appear to combine or conspire in restraint of trade to force a halt to LEC's development; to expand or obtain monopolies in transmission and generation; to obtain captive markets which they would allocate among themselves on an exclusive basis; and, among other things, to destroy an advantageous pool agreement of the Cities and Dow.

The proposal of July 17, 1969 was not accepted but became the basis for continued negotiations between the three companies acting collectively, LEC, and the REA Administrator. Evidently, relying upon the July 17th proposal, the Administrator has withheld from LEC the funds necessary to construct LEC's transmission system. LEC evidently felt constrained to continue negotiations because construction of its generating station was already underway, and the station will be useless, and the REA generation loan funds will be jeopardized, unless arrangements are made for transmitting this generation. The Cities, unwilling to do business on the basis proposed by the Companies, have not participated in such negotiations with the Companies. The negotiations continued for over a year. Throughout the negotiations the

three companies have acted in concert in support of their proposals and demands, as though they were a single entity, and there has been no competition between the three companies in respect to any aspect of LEC or pool business. Meanwhile, so much time has expired in negotiations that, were the REA Administrator to release the transmission funds, it is doubtful that the transmission system could be constructed and completed by the time of commercial operation of the LEC generating station. LEC has thus been rendered practically defenseless.

The three companies presented their latest proposal on August 10, 1970. There are a number of individual changes, but the overall format remains generally the same as the July 17, 1969 proposal. The minimum term ends in 1982 (Art. XII). Some rates and charges have been reduced. The agreement would provide that the Companies would take over LEC's sale to Dow of secondary energy during a four-year period, and they would sell such energy directly to Dow during hours when LEC's 200 MW generating station is operating and would otherwise be capable of supplying such secondary energy (Art. IX, Sec. 9.3). All the other obnoxious features noted above remain, with the exception that there has been eliminated the

requirement that LEC indemnify the three companies for any damages resulting from liability for causing the extinction of the LEC pool agreement.

The Companies are also proposing separate arrangements with each of the Cities, and Dow, under which some of the first four-year pool economic benefits would be obtained by these Cities, but only at the price of the extinction of the long-term pool and coordination arrangement. Since this arrangement is of separate and substantial value to the Cities, they cannot consider these separate proposals as satisfactory alternatives to the pool. 1/

The participation of Gulf States in this apparent combination or conspiracy, as well as its individual actions, appear to be inconsistent with and violate the Federal Power Act and the antitrust laws. Under these circumstances, the Commission must not authorize bond issues which would allow Gulf States to reap the fruits of its illegal actions. cf. Northern Natural Gas Co. v. FPC,

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1/ The statement by NRECA that "the pooling arrangement . . . will, to a major degree be honored by the Companies" is incorrect (Appendix A, p. 10). This can be explained by the fact that NRECA's spokesman had not seen a copy of the proposal (id. page 9).

399 F.2d 953 (D.C. Cir. 1968).[2/]

The way in which Gulf States' transmission and generating facilities are constructed further the apparently unlawful objectives involved. Therefore, the financing cannot be approved unless conditioned upon the cessation of the apparently unlawful actions and the establishment of a program which will rectify the damage which has already been done. Unless Gulf States will consent to such condition, establishing the original pool or its equivalent, obviously the application will have to be set down for hearing on this matter, and the Cities hereby so request.

V

For the foregoing reasons the Petitioners request that they be admitted as full parties to this proceeding; that the

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2/ See also SEC v. New England Electric System, 384 U.S. 176 (1966); SEC v. New England Electric System, 390 U.S. 182-185 (1968); Municipal Electric Ass'n of Mass. v. SEC, 413 F.2d 1052 (D.C. Cir. 1969); and Municipal Electric Ass'n of Mass. v. SEC, 419 F.2d 757 (D.C. Cir. 1969).

It should be noted that the Public Utility Holding Company Act must be read in close conjunction with Part II of the Federal Power Act, as these two grants of jurisdiction were parts of the same Act as passed by Congress.

application for authorization be set for hearing, and that the Commission take such other action as it may herein deem appropriate.

Respectfully submitted,

George Spiegel

Robert C. McDiarmid

Attorneys for Petitioners

November 2, 1970

Law Offices of:

George Spiegel
2600 Virginia Avenue, N. W.
Washington, D. C. 20037

VERIFICATION

DISTRICT OF COLUMBIA, SS:

George Spiegel, being first duly sworn, deposes and says that he is an attorney for the Cities of Lafayette and Plaquemine, Louisiana; and that as such he has signed the foregoing Protest and Petition to Intervene by Cities of Lafayette and Plaquemine, Louisiana, for and on behalf of said parties; that he is authorized so to do; that he has read said document and is familiar with the contents thereof; and that the matters and things therein set forth are true and correct to the best of his knowledge, information and belief.

George Spiegel

Subscribed and sworn to before
me this 2nd day of November, 1970.

Notary Public

My commission expires: [illegible]

ATTACHMENTS TO PROTEST AND PETITION TO INTERVENE BY CITIES OF LAFAYETTE AND PLAQUEMINE, LOUISIANA

Appendix A - Statement of National Rural Electric Cooperative Association before Subcommittee on Anti-Trust and Monopoly, Committee on the Judiciary U. S. Senate, June 10, 1970

Appendix B - Interconnection and Pooling Agreement among the Cities of Lafayette and Plaquemine, Louisiana; The Dow Chemical Company; and Louisiana Electric Cooperative, dated August 6, 1968

Appendix C - Draft of Power Sales and Transmission Agreement Between Central Louisiana Electric Company, Inc., Pineville, Louisiana; Gulf States Utilities Company, Beaumont, Texas; Louisiana Power & Light Company, New Orleans, Louisiana; and Louisiana Electric Cooperative, Inc.

Appendix D - Letter dated March 24, 1969 to Federal Power Commission from William C. Wise representing Jefferson David Cooperative, Inc.

STATEMENT OF NATIONAL RURAL
ELECTRIC COOPERATIVE ASSOCIATION
BEFORE SUBCOMMITTEE ON ANTI-TRUST
& MONOPOLY, COMMITTEE ON THE JUDICIARY
U.S. SENATE June 10, 1970

Mr. Chairman & Members Of The Subcommittee

My name is Charles A. Robinson, Jr. I am Staff Counsel To The General Manager of the National Rural Electric Cooperative Association (NRECA). NRECA is the national service organization of REA financed electric systems; which now provide central station electric service to some 24 million people in 46 states. These systems have constructed 44% of all electric distribution lines in the country to serve 8% of its electric consumers representing about 5% of industry sales. Their facilities are spread across 2,578 of the nation's 3,072 counties. More than 94% of all REA financed electric systems are members of NRECA. Such membership is entirely voluntary.

Rural electric systems generate only 22% of their total wholesale energy requirements. Most of the remainder is purchased from investor owned power companies (32%) and from Federal wholesale power marketing agencies such as TVA, the Bonneville Power Administration and the Bureau of Reclamation (39%).

The investor owned power companies sell electricity not only at wholesale to the cooperatives, but also, of course, at retail to their own ultimate consumers. They are, therefore, in many cases, competing at retail with the same rural electric systems to which they sell energy at wholesale.

Wholesale power cost represents 40% of all rural electric system

operating expenses. Therefore, if the companies can maintain the wholesale rate to cooperatives at a high level; or if they can impose restrictive conditions on its availability, such as limiting its use to serve large loads or charging a higher wholesale rate for such of it as is used by the cooperative to serve large loads, the companies can place the cooperatives under intense economic pressure, pirate their consumers and invade the territories in which they provide service. Some companies have, by such means, abused their dominant industry position in what has been an apparent effort to drive the cooperatives out of business, and, thereby achieve an even greater degree of dominance. Other companies have engaged in similar territorial and customer pirating tactics wholly aside from any wholesale power supply relationship.

Historically, the answer to this type of company imposed economic oppression has been construction by the cooperatives of their own generating plants and transmission lines financed with REA loans; so called G-T systems. The G-T phase has traditionally been the most bitterly contested and controversial aspect of the REA program; apparently because it is the vehicle by which the cooperatives achieve economic independence.

This independence rests not so much on actual construction of REA financed G-T plants, which constitute only 1.3% of the industry's total installed capacity, but rather upon knowledge by the power companies that

R 11

loans for this purpose are available and will be approved by REA unless the distribution cooperatives are able to obtain wholesale energy from alternate sources at reasonable rates and upon equitable terms and conditions.

For their part, those companies which have traditionally taken a "hard line" toward the cooperatives, have counter-attacked against the G-T with every conceivable means. These efforts by the companies against REA financed generation and transmission are exerted individually, in concert with other companies and sometimes in concert with other businesses. They involve legal, political, legislative and public relations activity at all levels; local, state and national. One of the most recent outstanding examples of concerted company activity against REA financed generation and transmission involves Louisiana Electric Cooperative (LEC). LEC is a cooperative corporation organized in Louisiana for the purpose of generating electricity in wholesale quanities and transmitting it to REA financed distribution cooperatives.

On September 12, 1964, the REA Administrator approved a $56.5 million loan to LEC for construction of a 200,000 Kw. generating station and 1,611 miles of transmission line; by which LEC was to provide lower cost wholesale energy supply for eight distribution cooperatives. The Administrator approved the loan to LEC not only because it would provide lower cost wholesale power than otherwise available, but also because the investor owned companies then providing such service were engaged

R 12

in pirating cooperative consumers, duplicating cooperative lines and building facilities to serve new loads which developed in territory previously served by the cooperatives. Prior to approving the G-T loan, the REA Administrator attempted to obtain agreement from the companies to respect the integrity of territory served by the cooperatives. This, the companies refused.

Two weeks after the September 12, 1964 LEC loan was approved, Central Louisiana Electric Company, soon thereafter joined by Louisiana Power & Light Company and Gulf States Utilities Company filed an action in the U.S. District Court for the Western District of Louisiana seeking temporary and permanent injunctions against LEC and its agents, and against the REA Administrator, to prohibit any and all actions in effectuation of the loan. A temporary injunction was issued by the District Court on November 18, 1964 (57 PUR3d 222, 236 F Supp 271). After additional protracted litigation, this injunction was reversed and dissolved by the Fifth Circuit Court of Appeals on January 13, 1966, the appeals court holding, in accord with a long line of similar cases, that the plantiff companies had no standing to maintain the action. See 63 PUR3d 154, 354 F2d 859. The companies, however, petitioned the U.S. Supreme Court for a writ of certiorari which was denied on October 10, 1966 (385 US 815, 87 S Ct. 34).

Meantime, beginning on September 30, 1964, the same group of companies plus Southwestern Electric Power Company had jointly, and simultaneously with the Federal action, sought an injunction from

R 13

the Louisiana Public Service Commission barring expenditure by LEC of any G-T loan funds until it had first obtained a certificate of convenience and necessity from the PSC. On September 25, 1967 the Louisiana PSC decided, after two sets of proceedings, that no such certificate was required (71 PUR3d 247) and dismissed the case. This decision was appealed by the companies and affirmed on January 20, 1969 by the Supreme Court of Louisiana (78 PUR3d 209, 218 So 2d 592).

The REA Administrator now seemed free to advance loan funds. However, the same company, Central Louisiana Electric Company, had, on October 17, 1968, filed a new complaint in the U.S. District Court for the Western District of Louisiana, asking for a new restraining order which was granted on December 12, 1968 notwithstanding the prior reversal of an essentially similar order by the 5th Circuit. Acting for REA, the Department of Justice then asked the 5th Circuit for either a dissolution of the new restraining order or a writ of prohibition. The temporary restraint was again dissolved by the 5th Circuit; the Court holding this time that "granting of a further restraining order by the District Court would, in our view, be improvident". (C.A. 5 Order (No. 27097) 12-12-68. The companies, on December 23, 1968, asked that a Justice of the U.S. Supreme Court stay the dissolution. On December 24, 1969, Justice Fortas refused, and initial funds were advanced on the loan which had originally been approved five years earlier.

Seven days thereafter, on December 31, 1968, attorneys for Gulf

R 14

States Utilities Company, one of the companies involved in the previous litigation, filed a derivative type action in Federal Court against Dixie Electric Membership Corporation, one of the distribution cooperatives to be served by LEC, LEC itself, and the REA Administrator; claiming to represent a group of the cooperative consumers and asserting that participation by Dixie in LEC was unlawful. The trial court dismissed this action. The 5th Circuit affirmed (K. O. Sibley et al v. REA et al 419 F2d 384, 1969) and the U.S. Supreme Court denied certiorari on June 1, 1970.

Two months later, attorneys for a second one of the subject group of companies, Louisiana Power & Light Company, filed a second derivative type action; this time in the state courts of Louisiana against N.E. Louisiana Power Cooperative and LEC, again asserting that participation by N.E. in LEC was unlawful. This action was removed to Federal court by the defendants where it still rests. The 5th Circuit, I am advised, has suggested that Judge Ben Dawkins, Jr., Chief Judge of the Western District of Louisiana, who signed the two earlier temporary injunctions, not handle this case.

Still another case was filed by one of the same companies in December of 1968; this one against Jefferson Davis Electric Cooperative by Gulf States Utilities Company in the state courts of Louisiana. Here, the company seeks to have the courts rather than the Public Service Commission apply the Louisiana Public Service Commission statute to

REA financed systems. The Supreme Court of Louisiana had previously, if will be recalled, held in several cases that the PSC itself had no jurisdiction over the cooperatives (218 So 2d 592, 78 PUR3d 209) (72 PUR3d 175; 205 So 2d 389 (1968)). This case against Jefferson Davis Electric Cooperative was also dismissed by the trial court, and is on appeal before the Supreme Court of Louisiana.

During all of this litigation, and up until the past year, the same companies conducted an active lobbying campaign in the Congress against appropriation of G-T loan funds and in the state legislature against passage of legislation which would grant the cooperatives legally protected service areas.

They also engaged in a strong statewide public relations campaign to discredit the REA program in the eyes of the public and more particularly to bestir public opinion against LEC. This campaign included radio, television, newspaper and magazine advertising.

Because of the long delay occasioned by the multitudinous litigation initiated by the investor owned power companies of Louisiana, the REA Administrator was prevented from advancing funds to LEC until December of 1969, more than five years after the loan was approved on September 12, 1964. In January, 1970, a new Administrator, David A. Hamil, of Colorado assumed the reins at REA.

Mr. Hamil found himself faced with a most difficult situation with

R 76

respect to LEC. Rural power loads in Louisiana had grown. The 200,000 Kw. generating station, originally capable of serving eight distribution cooperatives, could now only supply four. The $56.5 million loan, originally adequate to complete the project, had been eroded by inflation and the need for a heavier system to serve bigger loads. Mr. Hamil decided to continue advancing loan funds for the generating station, but not for building the cooperative transmission lines. He strongly urged LEC to negotiate for transmission service with the same companies which had kept it in court for five years at a cost to LEC of some $250,000.

Thus, the companies and cooperatives first met in a negotiating session initiated by Mr. Hamil on July 24, 1969, in New Orleans. At that meeting the cooperatives were presented with a draft contract jointly proposed by and bearing the names of Central Louisiana Electric Company, Gulf States Utilities Company and Louisiana Power & Light Company, dated July 17, 1969. It was an extremely restrictive proposal which would have:

(1) Prohibited LEC from serving any load except four of the original eight distribution cooperatives.

(2) Prohibited LEC from providing any wholesale service to any municipal system, and required LEC to cancel previously executed pooling contracts with Dow Chemical Company and the Cities of Lafayette & Plaquemine; and to hold the companies harmless from damages arising from such cancellation.

(3) Required LEC to sell all surplus power exclusively to the companies and buy from the companies exclusively all power needed to serve the four coops, above the plant capability.

(4) Required LEC to use company transmission exclusively.

(5) Granted the company an unqualified privilege of

(6) Required the cooperatives to support territorial protection legislation which largely benefited the companies, and gave the companies the right to cancel if such was not enacted at the Session of the legislature during which it was introduced.

The parties thereafter met on several occasions. The cooperatives were of the opinion that substantial progress was being achieved, and on December 10, 1969, the companies presented a new contract proposal. Execpt for one minor improvement, the new proposal was in all major respects equally as restrictive as the first, and, in addition, expressly provided that if LEC ever constructed another generating unit, it would have to be at the site of the original unit (New Roads, La.) or at another site acceptable to the companies, must be of a size agreed to by the companies and the companies would be granted a first refusal on all excess energy. This proposal was also offered jointly by the same three companies.

Meantime another year had gone by and the legal and economic pressure on LEC continued.

Although I have not seen a copy of it, I am advised that early in 1970 REA itself prepared a draft contract which was approved by LEC and submitted to the companies. The three companies (Central Louisiana Electric Company, Gulf States Utilities Company and Louisiana Power & Light Company) did not accept the REA draft, but countered with a third draft proposal of their own, dated April 28, 1970.

Although substantial matters remain to be resolved, it now appears that the three power companies and LEC will reach agreement under a twelve year contract by which the twelve REA financed electric systems in Louisiana will purchase wholesale energy at a rate only slightly higher than that which the cooperatives estimate would have been available, had they been allowed to build their own transmission system. Also, the pooling arrangement between LEC, Dow Chemical and the municipalities of Plaquemine and Lafayette will, to a major degree be honored by the companies. The companies and LEC are jointly requesting the Louisiana Legislature to enact reasonably equitable territorial legislation which the companies claimed to be unconstitutional when originally proposed in 1962 by the cooperatives and the REA Administrator.

Whereas this compromise will apparently be accepted by LEC and its member distribution cooperatives, such acceptance has been achieved not pursuant to any voluntary act of the cooperative people, but rather has eventuated from five years of concerted and repeated legal attack by the companies in the State and Federal courts and from the strongest type of concerted legislative and public relations offensive. Through this type of campaign, the three companies have achieved their real objective of preventing construction of a competing generation and transmission system in Louisiana.

Even under the compromise arrangement, all transmission service for LEC generating units will be provided by the companies; thereby isolating

them. All surplus energy must be sold to the companies and all capacity required by LEC above its plant capacity must be purchased from the companies. LEC will operate a captive plant.

The facts surrounding LEC are not unique. Essentially similar adventures have beset REA financed G-T systems in Colorado, Mississippi, Indiana, Maryland, Virginia, and Alabama. In some cases the cooperative G-T system has been totally stopped by state commission or court action. In other cases, the G-T has been delayed but, nonetheless, completed. In all cases, the attack has come from the investor owned power companies which claim total capability to supply all present and future needs for electricity. From this premise, which presently possesses somewhat less than total credibility due to voltage reductions and brownouts, these companies proceed, by a route the logic of which escapes me, to the conclusion that no generation or transmission facilities which are not under their ownership should exist.

It is the position of NRECA that non-duplicative competition in the electric utility business is healthy and that affirmative efforts by the power companies, which control 76% of the nation's generation, to suppress competition ought to be delcared unlawful if they are not already so.

One means of balancing the competitive scale between investor owned and other types of electric systems would be to give the consumer owned segment of the industry an effective weapon for counter attack. For instance, Section 204 of the Federal Power Act requires FPC approval for the issuance

by any jurisdictional electric system of any securities not subject to state regulation. It has been frequently suggested that this Section be amended to apply to all securities so issued, without regard to state regulation, and that it be further amended to expressly prohibit any such issuance if in the view of FPC the facilities to be constructed would tend to create or continue a situation inconsistent with the anti-trust laws.

Consumer owned electric systems, or the Attorney General of the U.S., given the privilege of intervening in such proceedings, could then use this statutory declaration to bring about a more balanced competitive picture in the industry.

We very much appreciate this opportunity to express our views on these matters.

* * * *

U. S. DEPARTMENT OF AGRICULTURE
RURAL ELECTRIFICATION ADMINISTRATION

REA BORROWER DESIGNATION Louisiana 30 Bayou

THE WITHIN Interconnection and Pooling Agreement among the Cities of Lafayette and Plaquemine, Louisiana; The Dow Chemical Company; and Louisiana Electric Cooperative, dated August 6, 1968

SUBMITTED BY THE ABOVE DESIGNATED BORROWER PURSUANT TO THE TERMS OF THE LOAN CONTRACT, IS HEREBY APPROVED SOLELY FOR THE PURPOSES OF SUCH CONTRACT.

DATED
NOV 19 1968

FOR THE ADMINISTRATOR

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June 20, 1968

82

INTERCONNECTION

AND

POOLING AGREEMENT

THIS AGREEMENT made this 6 day of August, 1968 among the Cities of Lafayette, Louisiana (hereinafter referred to as Lafayette) and Plaquemine, Louisiana (hereinafter referred to as Plaquemine); The Dow Chemical Company (hereinafter referred to as Dow) a Delaware Corporation; and the Louisiana Electric Cooperative (hereinafter referred to as LEC), a non-profit Louisiana Corporation.

WITNESSETH:

0.01 WHEREAS, Dow owns and operates an industrial plant in the vicinity of Plaquemine, Louisiana, which includes a large electric generating plant to supply steam and electricity for its operations; and

0.02 WHEREAS, Lafayette and Plaquemine own and operate municipal electric systems, including electrical generating facilities; and

0.03 WHEREAS, LEC is a federated cooperative, the members of which are electric distribution cooperatives, and plans to build, own and operate electrical generating and transmission facilities to supply the power requirements of its members; and

0.04 WHEREAS, LEC's electric transmission system will traverse territory in close proximity to the electrical generating facilities of the Parties to this Agreement; and

83

0.05 WHEREAS, the other Parties to this Agreement now own or intend to construct and own transmission substations and lines which will permit interconnection with LEC; and

0.06 WHEREAS, the generating facilities of the individual Parties will not at all times be required for supplying their respective requirements; and

0.07 WHEREAS, all parties to this Agreement can effect economies in investment and operating costs by operating their respective systems and facilities in a coordinated manner;

NOW, THEREFORE, in consideration of the mutual understandings herein contained, the parties agree as follows:

ARTICLE I: OBJECTIVES

1.01 The objectives of this Agreement are to promote and encourage coordination in the planning and the operation of the systems of the Parties to the maximum practical extent, and to provide a means whereby the Parties may realize and share in the mutual benefits which can be obtained by such coordination of planning and operation.

ARTICLE II: DEFINITIONS

For the purposes of this Agreement, the following definitions shall apply:

2.01 Power Supplier shall mean any properly organized body which owns and operates electrical generating facilities for service to the public or to its members.

89

2.02 Party shall mean any Power Supplier that is a signatory to this Agreement, and Dow.

2.03 Capacity shall mean the kilowatt availability or output capacity of an electrical generating plant or interconnected system of generating plants.

2.04 Energy shall mean usable kilowatt hours from an electrical generating plant or interconnected system of generating plants.

2.05 Firm Power shall mean Capacity and Energy which is intended to be continuously available.

2.06 Surplus Power shall mean Capacity and Energy on a Party's electrical generating system which is in excess of its Annual System Demand and Reserve Capacity Obligation and which is available for sale or is sold to one or more Parties on the basis that it is to be continuously available for a specified period but without the Seller assuming any Reserve Capacity Obligation with respect thereto.

2.07 Secondary Energy shall mean Energy from generating capacity not otherwise being utilized to generate Energy, and which is made available for a specified period on the basis that it can be interrupted instantaneously under the circumstances authorized by this Agreement.

2.08 Economy Energy shall mean Energy from generating capacity of a Party not otherwise being utilized which is made available to another party for the purpose of replacing, and to the extent that it does replace, Generating Capacity of the purchasing Party. The purpose of Economy Energy transfers is to enable the purchasing Party to realize savings by reducing or avoiding high cost generation from its own generating units.

85

2.09 Emergency Outage shall mean any unanticipated, unscheduled breakdown in the availability of generating or transmission facilities.

2.10 Emergency Energy shall mean energy which is supplied by one Party to another Party as a result of an Emergency Outage affecting the ability of such other Party to carry its loads.

2.11 Scheduled Outage shall mean any shutdown of generating or transmission facilities for maintenance or testing purposes, which is scheduled in advance and coordinated by the Operating Committee.

2.12 Scheduled Outage Energy shall mean energy which is supplied by one Party to another Party as a result of a Scheduled Outage.

2.13 System Demand of a Party shall mean the number of kilowatts equal to the net number of kilowatt hours required in any clock hour (after deducting the receipts of Secondary Energy and Firm Power during such hour) for the supply of Energy to the Party's own system load, including system losses and Firm Power sold to others but excluding station use and Surplus Power deliveries to another Party. In the case of Dow, the System Demand shall be the amount obtained as above provided, divided by (1+R), where R equals the Reserve Capacity Obligation of Dow as percent of load divided by 100 if Dow's Reserve Capacity Obligation was fulfilled on an interruptible basis during such hour.

2.14 Monthly System Demand of a Party shall mean its highest System Demand occuring during a calendar month.

2.15 Annual System Demand of a Party shall mean its highest Monthly System Demand occuring during a calendar year.

86

2.16 Generating Capacity of a Party shall mean its demonstrated four (4) hour sustained power output in kilowatts at the time the integrated peak demand on the combined systems of all Parties occurs during a calendar year, less the power (kilowatts) required to operate the auxiliaries of the unit or units included in the four (4) hour rating of capability. Purchased Surplus Power shall be included in the total of the Generating Capacity of the Purchasing Party.

2.17 Reserve Capacity of a Party shall mean the excess in kilowatts of such Party's Generating Capacity over the sum of such Party's Annual System Demand and the Surplus Power Committed to other Parties.

2.18 Reserve Capacity Obligation of a Party shall be 15% of its Annual System Demand or such other amount as the Parties shall from time to time agree. In the case of Dow, that part of its Generating Capacity serving certain production loads which Dow can and will drop instantanteously when required for pool reliability purposes (hereinafter referred to as "Interruptible Loads"), shall be considered as available to meet its reserve Capacity Obligation.

2.19 Spinning Reserve of a Party shall mean that part of a Party's Generating Capacity which is unloaded and rotating in synchronization with the interconnected systems of the Parties and which, in the event of an emergency outage, is capable of promptly picking up load in an amount not less than such Party's Spinning Reserve Obligation, together with that part of its Generating Capacity which is loaded as a result of sales of Secondary Energy to Dow.

In the case of Dow, that part of Dow's Generating Capacity serving Interruptible Loads shall be considered as available to meet its Spinning Reserve Obligation.

87

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2.20 Spinning Reserve Obligation of a Party shall mean the amount of Spinning Reserve such Party is obligated to maintain in accordance with the directions of the Operating Committee. No Party shall be obligated to supply more Spinning Reserve than the amount of its Reserve Capacity Obligation.

2.21 System Capacity Responsibility of a Party shall mean the Generating Capacity required to meet the sum of a Party's Annual System Demand, its Surplus Power committed to other Parties, and its Reserve Capacity Obligation.

2.22 Transmission Capacity shall mean the amount of power (kilowatts) that can be effectively moved from one point to another point over a circuit.

2.23 Wheeling shall mean the use of the transmission system of any of the Parties for the movement of energy from the system of one Party to the system of another Party.

ARTICLE III: FACILITIES TO BE PROVIDED

3.01 The points of interconnection between the Parties and the equipment and facilities to be installed by them are set forth in the Facilities Schedules attached hereto and made a part hereof. The respective Parties shall install such facilities with all reasonable dispatch, and installation shall be so coordinated that the facilities of Lafayette, Plaquemine and Dow shall be completed no later than the completion of LEC's transmission facilities.

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88

3.02 It is recognized that from time to time changes will be required in the Facilities Schedule in order to meet the intent and requirements of this Agreement. Such changes will be accomplished by amending the Facilities Schedule or by adding new schedules, subject to concurrence of the Parties.

3.03 Subject to reasonable notice and compliance with other reasonable rules of the affected Party, authorized employees and agents of any of the Parties shall have the right of access, ingress and egress to the property of a Party at all reasonable times for the purpose of installing, testing, inspecting, repairing, replacing or removing equipment as provided for in this Agreement or as may be necessary to comply with the objective of this Agreement.

ARTICLE IV: SERVICE RESPONSIBILITIES

4.01 Each Party shall maintain at all times sufficient Generating Capacity to meet its System Capacity Responsibility. The required amounts of such Generating Capacity shall be maintained by additions, as necessary, to the Party's generating facilities or by the purchase of Surplus Power. The Parties shall jointly plan and coordinate the addition of generating and transmission facilities to the pool system in an optimum manner. It is contemplated that when a Party agrees in accordance with such joint plans to install additional generating capacity which will make available quantities of Surplus Power, the Parties shall enter into supplementary agreements for the purchase and sale of blocks of such Surplus Power for the periods in which they are expected to be available.

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4.02 The Pool Dispatcher shall have overall responsibility for coordination of the operation of the interconnected systems of the Parties under the direction of the Operating Committee. LEC's dispatcher shall serve as the Pool Dispatcher.

4.03 Each Party shall exercise due diligence, reasonable care and foresight to carry out its obligations under this Agreement, but shall not be considered to have failed in said obligations by reason of service interruptions or curtailments or other inability to furnish service occasioned by an Uncontrollable Force, as hereinafter defined. Such service interruptions and curtailments or inability to furnish service shall not constitute a breach of this Agreement.

4.04 The aggregate amounts of Spinning Reserve to be maintained at any time to meet the requirements for the pool and the contribution of each Party thereto shall be as determined by the Operating Committee, subject to the limitations hereinabove set forth.

4.05 In case of an emergency, any Party, upon direction of the Pool Dispatcher, shall supply Emergency Energy to another Party up to the full extent of its available generating capacity, including both hot and cold standby generating units. The duration of the emergency shall be the time necessary to complete the necessary repairs and/or replacement in an expeditious manner. The Party suffering an emergency outage shall utilize its own generating facilities to the extent available to replace generating capacity out of service due to the emergency.

4.06 If it appears that a Party's emergency outage will continue for an extended period of time, the Pool Dispatcher shall schedule the startup of sufficient available generating facilities in the Pool, in the order of greatest economy, to enable the interconnected facilities to serve all their loads. Should this result in one or more Parties carrying a disproportionate burden, the Operating Committee may recommend, and the Parties shall make, equitable contribution in order to remedy such disproportion.

4.07 Any Party, at the direction of the Pool Dispatcher, shall supply Scheduled Outage Energy to another Party up to the full extend of its available Generating Capacity, except that required to meet its Spinning Reserve Obligation, provided that the responsibility of supplying Scheduled Outage Energy shall be so allocated as to minimize interruptions or curtailments of loads. Schedules of outages shall be prearranged with the Pool Dispatcher in a manner set forth by the Operating Committee.

4.08 In the interest of optimum pool economy, each Party shall endeavor to purchase and use energy available on the systems of the other Parties to the extent it can economically utilize such energy, and each Party having unused capacity at any time which is available for generating energy shall produce and sell such energy when desired by another Party. Unless otherwise agreed by the Parties, all sales of Capacity and/or Energy between Parties shall be of the classes defined in this Agreement.

4.09 Dow agrees to purchase all tendered Secondary Energy which, in its judgment, it can use to its economic advantage and the other Parties shall tender to Dow all Secondary Energy available on their respective systems. In the last quarter of each calendar year, the Operating Committee shall develop as closely as possible agreed schedules of delivery of Secondary Energy for ensuing calendar periods.

4.10 The systems of the Parties shall be operated on a continuously interconnected basis under normal system conditions, and the Parties shall cooperate in keeping the frequency of the interconnected systems of the Parties at 60 cycles per second as closely as is practicable, in keeping the interchange of energy between the systems of the Parties as closely as is practicable to the scheduled amounts, and in maintaining mutually satisfactory voltage levels. Each Party shall be responsible for meeting the volt-ampere reactive requirements of its system but volt-amperes reactive current may be interchanged between systems from time-to-time, subject to agreement between authorized representatives of the Parties, when benefit to one system may be gained thereby without causing hardship to another system.

4.11 The systems of the Parties shall normally be so designed, maintained and operated as to minimize, in accordance with good practice, the likelihood of a disturbance originating in the system of one Party causing impairment to the service of the system of any other Party or of any other system with which the systems of the Parties are interconnected.

4.12 It is recognized that unintentional flows of energy between interconnected systems will occur because of the impossibility of continuously controlling generation to exactly equal the load. Therefore, it shall be the responsibility of each Party to maintain the net energy flowing into and out of its system during each hour so that deliveries are, as nearly as practicable, equal to the net scheduled amount. The difference between the net scheduled deliveries and the actual net deliveries shall be balanced out in kind in accordance with principles and practices established by the Operating Committee.

4.13 In the event that a Party's projected System Demands indicate that it will be unable to meet its Reserve Capacity Obligation, such Party shall immediately arrange for the purchase of Surplus Power or Firm Power in an amount sufficient to enable it to fulfill its Reserve Capacity Obligation.

4.14 To assure that there will be an adequate amount of Spinning Reserve on the systems of the Parties, the Pool Dispatcher is designated as the Spinning Reserve Coordinator, and shall be responsible, under the direction of the Operating Committee, for designating the extent and manner of maintaining adequate Spinning Reserve at all times.

4.15 The Parties shall install, operate and maintain, or cause to be installed, operated and maintained, on their respective systems, such equipment as may be required to afford a coordinated communication system between the dispatchers of the Parties and the Pool Dispatcher. The respective obligations of the Parties with respect to such facilities are set forth in the Facilities Schedule.

ARTICLE V: ORGANIZATION OF OPERATING COMMITTEE

5.01 The coordination of all power pool operations and activities shall be carried on under the direction of an Operating Committee.

5.02 The Operating Committee shall consist of a representative of each of the Parties, designated by such party as its authorized representative on such Committee. Each Party shall also designate an alternate who may substitute for the representative in his absence.

5.03 Each Party shall evidence appointments to the Operating Committee by written notice to the other Parties hereto and by similar notice any Party may at any time change its representative or alternate on such Committee.

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93

5.04 Each member of the above Committee shall have the option of inviting another member of his organization, or others, as his advisors to attend meetings of the Committee.

5.05 The expenses of each member of the above Committee and of his advisors shall be borne by the Party he represents.

5.06 Expenses incurred by the Operating Committee in addition to those hereinabove mentioned shall, unless otherwise agreed, be shared by dividing 20% of the year's expense equally between the Parties, and dividing 80% among the Parties in that proportion which each Party's Annual System Demand bears to the sum of the Annual System Demands of all Parties. LEC shall make all payments in connection with such expenses and shall bill the Parties for their respective shares.

5.07 The Operating Committee shall select annually one of its members to act as Chairman, it being the intent that the office of Chairman be rotated. Another member shall act as secretary.

5.08 Minutes of all Committee meerings shall be kept by the Secretary and copies thereof furnished promptly to each Party.

5.09 The Operating Committee may by unanimous action adopt or amend its own rules of procedure. Such rules may provide for action on prescribed matters or classes of matters by majority vote. The Operating Committee shall take no action inconsistent with the provisions of this Agreement.

ARTICLE VI: DUTIES OF THE OPERATING COMMITTEE

6.01 The Operating Committee shall develop and follow and also recommend to the Parties such uniform practices, rules, and procedures as may be required to coordinate the planning and operations of the systems of the Parties so as to optimize economy operations and reliability of service.

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94

6.02 The Operating Committee shall hold regularly scheduled meetings at least twice annually following the summer and winter peak load periods of the Parties and at other times upon call of the Chairman or any member. At lease five (5) days' written notice shall be given to each member of the Operating Commiteee of any meeting of such Committee, whenever possible.

6.03 The Operating Committee periodically shall review the System Demand and Generating Capacity forecasts of the Parties. Each Party shall supply to the members of the Operating Committee, at least one month in advance of the regularly scheduled semiannual meeting of the Committee, its Monthly System Demand and Generating Capacity forecast, in such form as the Operating Committee may specify, for a period of at least five years in advance or for such other period in advance as the Operating Committee may specify.

6.04 The Operating Committee shall estimate the System Capacity Responsibility for each Party for a period of five years in advance and, if in the light of experienced loads or if otherwise appropriate, shall revise such estimate prior to the summer peak load each year. In estimating System Capacity Responsibility, forecasted system demand shall be based on the best available information.

6.05 The Operating Committee shall estimate the Generating Capacity of each Party as of the effective date of this Agreement and as often thereafter as any substantial change may occur. The Operating Committee also shall review each Party's Generating Capacity at least semiannually, and at any other time upon the written request of a Party, and any appropriate changes resulting from such review shall be made.

R 95

6.06 The Operating Committee will arrange for or conduct such transmission network studies of the systems of the Parties as may be required to (a) determine the effect of planned additional generating units and the effect of planned additional transmission and interconnection facilities, (b) furnish data for studies on the most efficient utilization of all generating capacity in the combined systems, and (c) perform its other duties hereunder.

6.07 In making such studies, the Operating Committee shall give consideration to the size and anticipated rate of growth of each Party's load, the size of each Party's largest generating unit, the Reserve Capacity of each Party, the possibilities of equitable staggering of future investments by the Parties in generating and transmission facilities, and other relevant factors.

6.08 The Operating Committee shall coordinate the maintenance schedules of the Parties so as to maintain at all times an adequate amount of operable generating capacity on the combined system. Any Party requiring Scheduled Outage Energy shall follow the schedules and procedures prescribed by the Operating Committee for obtaining such energy.

6.09 The Operating Committee shall recommend procedures to be followed by the Parties in restoring the Spinning Reserves of the interconnected systems in the event of a large generator failure or other comparable contingency. Such procedures shall be reviewed periodically by the Operating Committee.

6.10 The Operating Committee shall collect and process statistical data, operating data and other information which it believes will be of assistance to the Parties.

6.11 The Operating Committee also shall perform such other duties as may be prescribed by the Parties.

ARTICLE VII: METERING

7.01 All metering equipment required for recording the interchanges or deliveries of power and energy between the systems of the Parties shall be maintained by the Party owning such metering equipment, in accordance with good practice in the industry.

7.02 Should any such metering equipment at any time fail to register, or should the registration thereof be so erratic as to be meaningless or unreliable, the power and energy delivered shall be determined from the best information available.

7.03 Meters owned by the Parties at points of interconnection with each other shall be tested and inspected semiannually. The meter shall be inspected and tested within 60 days after installation and after a change of instrument transformers. The owner of the meter shall bear the expense of the meter test and inspection. Additional tests and inspection of meters shall be made whenever reasonably requested by another party, such requesting Party to bear the expense of the additional tests and inspection when the meter is found to be in error by one percent or less. The Party owning the meter shall give reasonable advance notice of all tests and inspections so that representatives of the other party may be present. If any test or inspection of a meter shows it to be inaccurate by more than one percent fast or slow, an adjustment in deliveries shall be made during the following month to adjust for amounts by which the meters were shown to have been in error for the preceding period of inaccuracy. If the period of inaccuracy is not known, it shall be assumed to be one-half the interval since the last preceding test. The meter or other equipment found to be inaccurate or defective shall be promptly repaired, adjusted or replaced.

7.04 It is recognized by the Parties that power and energy will be integrated with power and energy from generating facilities owned by others, and each party may have interconnection and exchange agreements with other power systems. Accordingly, the flow of power and energy between the systems of the Parties and the interconnected systems of others will in part be controlled by the physical and electrical characteristics of such systems, and power and energy purchased, sold or exchanged under this Agrement may flow through any or all of such interconnected systems. In order to account for the power and energy purchased, sold or exchanged under this Agreement the Parties shall, by mutual agreement, from time to time, determine methods and take appropriate action to establish accounting and operating procedures to be followed in calculating the amounts of power and energy delivered and received by each.

7.05 It is recognized that the flow of electric power and energy between the interconnected systems of the parties hereto will not be completely within the control of the parties, but will in part be controlled by the electrical characteristics of such systems and the manner in which they are operated. It is further recognized that by reason of such characteristics and operations, the delivery of electric power and energy may vary from scheduled deliveries, and that power and energy may be exchanged inadvertently. The parties shall operate their generation, transmission and related facilities in such manner, consistent with their other power commitments as to follow as closely as practicable to the scheduled delivery and receipt of electric power and energy, but the inadvertent delivery of power and energy in excess of or less than the amounts scheduled shall not constitute a breach of this Agreement. Such inadvertent deviations from schedule shall be balanced off by the Parties as soon as practicable in the subsequent deliveries and receipts of power and energy and under load conditions reasonably comparable to those existing at

R 98

the time said inadvertent deviations occured. No charge shall be made by either Party for inadvertent deliveries or for power and energy delivered to balance off the same.

ARTICLE VIII: RECORDS

8.01 The Parties shall keep such log sheets and other records specified by the Operating Committee as may be needed to afford a clear history of the various movements of power and energy between the systems of the Parties involved. The originals of all records shall be open to inspection by representatives of the Parties concerned and by the Operating Committee.

8.02 Each Party shall furnish to the Operating Committee appropriate data from meter registrations and from other sources on such time bases as are determined by the Operating Committee when such data is needed for settlements, special tests, operating records, or for other purposes consistent with the objectives hereof. As promptly as practicable after the end of each month, each Party shall render to the other Parties statements setting forth appropriate data from meter registrations and other sources in such detail and with such segregation as may be needed for operating records and for settlements hereunder.

ARTICLE IX: BILLINGS AND PAYMENTS

9.01 All charges for power and energy shall be as set forth in the Service Schedule which is attached hereto and hereby made a part of this Agreement.

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9.02 All bills for services supplied pursuant to this Agreement shall be rendered monthly by the supplying Party to the purchasing Party, not later than fifteen (15) days after the end of the period to which such bills are applicable. Unless otherwise agreed upon by the Operating Committee, such periods shall be from 12:01 A.M. of the first day of one month to 12:01 A.M. of the first day of the succeeding month. Bills shall be due and payable within fifteen (15) days from the date such bills are rendered and payment of net amounts shall be made when due.

ARTICLE X: UNCONTROLLABLE FORCE

10.01 A Party hereto shall not be considered to be in default in respect of any obligation hereunder if prevented from fulfilling such obligation by reason of uncontrollable forces. The term Uncontrollable Forces shall be deemed for the purpose hereof to mean storm, flood, lightning, earthquake, fire, explosion, failure of facilities not due to lack of proper care of maintenance, civil disturbance, labor disturbance, sabotage, war, national emergency, restraint by court or public authority, or other causes beyond the control of the Party affected, which such Party could not reasonably have been expected to avoid by exercise of due diligence and foresight. Any Party unable to fulfill any obligation by reason of an Uncontrollable Force shall exercise due diligence to remove such disability with reasonable dispatch.

ARTICLE XI: APPROVALS AND TERMS

11.01 This Agreement shall be subject to any state or federal regulator bodies having jurisdiction and shall become effective upon execution by the Parties and approval of the Administrator of the Rural Electrification Administration, and shall remain in effect for ten (10) years

R 100

from the date this agreement is approved and shall continue in effect from year to year thereafter until terminated by any Party upon at least three years written notice to the other Parties.

11.02 Notwithstanding anything to the contrary in this Agreement, in the event the Federal Power Commission, the Louisiana Public Service Commission or any other federal, state or local governmental agency formally asserts jurisdiction over Dow at any time, under present or future law or regulation, because of Dow's participation in this Agreement or because of the activities of any of the other Parties, Dow shall have the right to withdraw from this Agreement without penalty upon the giving of four (4) years written notice of such election to withdraw to each of the other parties; provided, however, that any assertion of jurisdiction by the Louisiana Public Service Commission under existing law shall be appealed by Dow and its right of withdrawal shall be postponed unless and until such assertion of jurisdiction is confirmed by decree of a competent court. Dow shall prosecute an appeal or appeals from any adverse ruling of such a court to the Supreme Court of Louisiana, and if it shall prevail in such court within any period of notice of withdrawal such notice shall thereupon be void.

11.03 Nothing contained in this Agreement shall obligate any Party:

a. To provide any facilities, other than those described in the Facilities Schedule, for which it is unable to obtain necessary financing on reasonable terms or

b. To enter into any contract or to amend or cancel any existing contract without the approval, if such approval is required, of the holder of such Party's loan contract, mortgage, or bond indenture.

100

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11.04 No amendments or other modifications of this Agreement, including the addition of any new party or parties, shall be made without the written consent of all the Parties.

11.05 It is distinctly understood and agreed that this Agreement in no way obligates any Party to receive electric service except as may be provided in a Supplemental Agreement. This Supplemental Agreement will be effective for a period of not more than three years with regard to the purchase by any Municipality of any electricity and for succeeding like periods thereafter as may be mutually agreed upon by the Parties.

IN WITNESS WHEREOF, the Parties hereto, pursuant to the appropriate authority of each have executed this Agreement in five counterparts as of the date first written above.

City of Plaquemine, Louisiana

Attest:

Norma H. Sullivan
City Clerk

Harry K. Gallaugher
Mayor

City of Lafayette, Louisiana

Attest:

Mrs. Gustave A. Rabouchaux
City Clerk

Mayor

The Dow Chemical Company

Attest:

Asst. Secretary

President

Louisiana Electric Cooperative, Inc.

Attest:

President

R102

INTERCONNECTION AND POOLING AGREEMENT

SERVICE SCHEDULE

Surplus Power

Capacity:	$10.00/Year/KW of contract capacity, payable monthly
Energy:	3½ mills/KWH *
Wheeling:	$2.80/Year/KW ***

Scheduled Outage Energy

Capacity:	None
Energy:	4½ mills/KWH *
Wheeling:	None

Emergency Energy

Capacity:	None
Energy:	5½ mills/KWH *
Wheeling:	None

Economy Energy

Capacity:	None
Energy:	½ the incremental cost ** of the supplying Party plus ½ the decremental cost** of the receiving Party
Wheeling:	None

Secondary Energy

Capacity:	None
Energy:	Incremental cost ** + 0.5 mills (including 0.1 mills/KWH wheeling charge where applicable ***)
Wheeling:	(See above line)

* Fuel Cost Adjustment:

The energy portion of the rate charged for Surplus Power, Scheduled Outage Energy and Emergency Energy shall be adjusted annually to reflect changes in the weighted average fuel cost of all parties for the previous calendar year. Such increase or decrease shall be computed by dividing the total Btu's consumed by the Pool by the net kilowatt hours produced by the Pool for the same calendar year and multiplying the resultant quotient by the increase or decrease in fuel cost

(expressed in dollars per Btu) from the weighted average fuel cost of all parties for the calendar year 1972.

** Incremental and Decremental Costs shall be determined in accordance with rules established by the Operating Committee.

*** Wheeling Charges shall be applied only for use of the transmission system of a Party which is not otherwise involved in the transaction.

R 104

INTERCONNECTION AND POOLING AGREEMENT

FACILITIES SCHEDULE

This schedule is provided pursuant to Section 3.01 of the Interconnection and Pooling Agreement.

SECTION 1

Dow shall furnish and install the following equipment:

(1) Transformer and interconnection capacity to provide not less than its Reserve Capacity Obligation.

(2) A 161 KV Breaker at the point of interconnection with the Louisiana Electric Cooperative System.

(3) Metering on the 161 KV current transformers facilities plus metering and relaying equipment as needed to satisfy the requirements of the Operating Committee.

(4) Transmission facilities to interconnect Dow's system with the basic switching station to be built by LEC, including the necessary related equipment.

SECTION 2

LEC shall furnish and install the following equipment:

(1) A switching station, hereinafter referred to as the Plaquemine Station, at a point mutually agreed upon between Dow and LEC at or near Dow's premises at Plaquemine, Louisiana, to accomplish transmission line switching and provide space and station service to accomodate the circuit breakers to be installed by other Parties.

(2) A switching station at or near Lafayette, Louisiana, hereinafter referred to as the Lafayette Station.

(3) A switching station, hereinafter referred to as the New Roads Station at or near the generating plant it proposes to build in the vicinity of New Roads, Louisiana.

(4) The 161 KV transmission lines and associated facilities required to interconnect the Lafayette and Plaquemine Stations with each other and with the New Roads Station.

(5) Necessary communications equipment, as specified by the Operating Committee. The cost of such facilities shall be shared, with each Party paying for the terminal facilities on its premises, and LEC paying for the remainder.

SECTION 3

Lafayette shall furnish and install the following equipment:

(1) 161 KV transmission facilities, including provision for a circuit breaker to be installed in the future, and all necessary transformers and related equipment, to interconnect the Lafayette system with a switching station to be constructed by LEC at or near Lafayette's corporate limits, at a mutually agreeable location.

SECTION 4

Plaquemine shall furnish and install the following equipment:

(1) 69 KV transmission facilities necessary to interconnect the Plaquemine system with the Plaquemine Station, including a circuit breaker at said switching station in a bay to be provided by LEC, and necessary transformers and related equipment.

R 106

SECTION 5

Each Party shall pay for furnishing, installing, operating and maintaining the facilities and equipment which it is obligated to provide hereunder, and shall have title thereto, except as otherwise provided with respect to communications equipment.

R107

RESOLUTION

BE IT RESOLVED by the Board of Directors of Louisiana Electric Cooperative, Inc., that the President, A.A. Robinson, be and he is hereby authorized to execute power pooling contracts between Dow Chemical Company, the City of Lafayette and the City of Plaquemine, Louisiana.

BE IT FURTHER RESOLVED that these contracts are invalid unless approved by the Rural Electrification Administration.

CERTIFICATE

I, J.S. Robbins, the duly elected Secretary of the Louisiana Electric Cooperative, Inc., hereby certify that the above and foregoing is a true and correct copy of a resolution adopted by the Board of Directors of said corporation at the special meeting of the Board of Directors held on September 9, 1968 with a quorum present and voting therefor; that the same is still in full force and effect.

IN TESTIMONY WHEREOF witness my signature and seal of said corporation hereunto affixed at Jennings, Louisiana, on this 17th day of September, 1968.

J.S. Robbins
Secretary

R 108

RESOLUTION BY THE BOARD OF TRUSTEES OF THE CITY OF LAFAYETTE AUTHORIZING THE PROPOSED INTERCONNECTION AND POOLING AGREEMENT BETWEEN LOUISIANA ELECTRIC COOPERATIVE, INCORPORATED, THE DOW CHEMICAL COMPANY, THE CITY OF PLAQUEMINE, AND THE CITY OF LAFAYETTE, LOUISIANA

BE IT RESOLVED by the Board of Trustees of the City of Lafayette, Louisiana that the City of Lafayette enter into an interconnection and pooling agreement with Louisiana Electric Cooperative, Inc., the Dow Chemical Company, and the City of Plaquemine, Louisiana, all in accordance with the terms and conditions of the contract heretofore submitted to the City of Lafayette, Louisiana.

BE IT FURTHER RESOLVED that Mayor J. Rayburn Bertrand be and he is hereby authorized to execute said agreement on behalf of the City of Lafayette, Louisiana.

RESOLUTION passed in regular session assembled this 6th day of August, 1968.

MAYOR

CLERK

R109

STATE OF LOUISIANA

Parish of Lafayette

I, the undersigned, Clerk of the City of Lafayette, State of Louisiana, do hereby certify that the foregoing page constitutes a true and correct copy of a resolution of the Board of Trustees of the City of Lafayette, Louisiana, authorizing an interconnection and pooling agreement between Louisiana Electric Cooperative, Inc., the Dow Chemical Company, the City of Plaquemine and the City of Lafayette, Louisiana.

IN FAITH WHEREOF, witness my official signature and the impress of the official seal of said City of Lafayette, Louisiana, this 6th day of August, 1968.

Mrs. Curtis A. Redemeaney, Clerk

R110.

Plaquemine, Louisiana

The Mayor and Board of Selectmen of the City of Plaquemine, Iberville Parish, Louisiana, met in Special session at the City Hall, in the City of Plaquemine, on Monday, the 4th day of November, 1968, at 7:30 o'clock P.M., with the following members present:

Archie V. Callais	, Selectman
Ralph J. Comeaux	, Selectman
Paul T. D'Albor	, Selectman
George J. Guidry, Jr.	, Selectman
D. J. McDuffie	, Selectman

Harry K. Gallagher, Mayor

ABSENT:

After the meeting had been called to order, the roll was read with the above results, and the Clerk then presented his affidavit evidencing the giving of proper notice of the calling of the meeting to each member of the Board, which affidavit was approved and filed.

On Motion of Mr. Callais, seconded by Mr. D'Albor, the following resolution was adopted:

RESOLUTION

A RESOLUTION AMENDING THE RESOLUTION OF THE 27TH DAY OF JUNE, 1968, WHEREIN THE MAYOR OF THE CITY OF PLAQUEMINE WAS AUTHORIZED TO SIGN AN INTERCONNECTION AND POOLING AGREEMENT WITH THE CITY OF LAFAYETTE, LOUISIANA, THE DOW CHEMICAL COMPANY AND THE LOUISIANA ELECTRIC CO-OPERATIVE, INC., A COPY OF WHICH AGREEMENT WAS ATTACHED TO THE RESOLUTION AND MARKED EXHIBIT "A" FOR REFERENCE.

WHEREAS, on the 27th day of June, 1968, the Mayor of the City of Plaquemine, Louisiana, was authorized, directed and empowered to sign an Interconnection and Pooling Agreement with the City of Lafayette, Louisiana, The Dow Chemical Company and the Louisiana Electric Co-Operative, Inc., copy of which contract was attached to said resolution and marked Exhibit "A"; and

WHEREAS, in said resolution, the following paragraph was contain:

"NOW, THEREFORE, BE IT RESOLVED that the Mayor of the City of Plaquemine, be and he is hereby authorized, directed and empowered to sign the interconnection and pooling agreement, a copy of which is attached to this resolution, marked exhibit "A", with the City of Lafayette, Louisiana, the Dow Chemical Company and the Louisiana Electric Cooperative, binding and obligating the City of Plaquemine for a period of three (3) years and to sign a supplemental agreement for electric service which will be effective for a period of not more than three (3) years with the regard to the supply and purchase, by this municipality, of electricity, and to sign additional supplemental agreements for succeeding like periods thereafter, which are to be mutually agreed upon by the parties to this interconnection and pooling agreement."

WHEREAS, Article XI. of the Interconnection and Pooling Agreement executed by the Mayor, contains the following paragraph:

"11.01 This agreement shall be subject to any state or federal regulator bodies having jurisdiction and shall become effective upon execution by the Parties and approval of the Administrator of the Rural Electrification Administration, and shall remain in effect for ten (10) years from the date this agreement is approved and shall continue in effect from year to year thereafter until terminated by any Party upon at least three years written notice to the other Parties."

WHEREAS, said Article XI. also contains the following paragraph:

"11.05 It is distinctly understood and agreed that this Agreement in no way obligates any Party to receive electric service except as may be provided in a Supplemental Agreement. This Supplemental Agreement will be effective for a period of not more than three years with regard to the purchase by any Municipality of any electricity and for succeeding like periods thereafter as may be mutually agreed upon by the Parties."

WHEREAS, Revised Statute 33:4164 of the State of Louisiana contains the following language:

Revised Statute 33:4164

"B. Municipalities may obtain water supply or electric current under contract for a time not exceeding three years from private persons on the terms and conditions agreed upon by the parties. A contract made with private persons for furnishing water or electric current for periods in excess of three years must be approved by a majority of the electors of the municipality voting at a special election for that purpose." As amended Acts 1962, No. 489, § 1.

WHEREAS, some conflict of opinion exists as to whether or not the original resolution dated 27th day of June, 1968 will permit the City of Plaquemine to enter into this Interconnection and Pooling Agreement for a period of ten (10) years as contained in Article XI. of said agreement; and

WHEREAS, it is the intention of the City of Plaquemine and its Governing Authority to conform to the provisions of Revised Statute 33:4164.

NOW, THEREFORE, BE IT RESOLVED that the resolution of June 27, 1968, the fourth paragraph thereof, be and it is hereby amended to read as follows:

NOW, THEREFORE, BE IT RESOLVED that the Mayor of the City of Plaquemine, be and he is hereby authorized, directed and empowered to sign the Interconnection and Pooling Agreement, a copy of which is attached to this resolution, marked Exhibit "A", with the City of Lafayette, Louisiana, The Dow Chemical Company and the Louisiana Electric Co-Operative, Inc., binding and obligating the City of Plaquemine for the term therein stated, and under the provisions of said contract, and to sign supplemental agreements for electric service and energy for a period of three years with regard to the supply and purchase by this municipality, of electric energy, and to sign additional supplemental agreements

be mutually agreed upon by the parties to this interconnection and pooling agreement. R 114

BE IT FURTHER RESOLVED, that notwithstanding any provision of the attached contract to the contrary, in accordance with the provisions of Louisiana Revised Statute 33:4164, the City of Plaquemine will not be bound to purchase or obtain electric energy for more than three (3) years under this agreement attached herewith or any supplemental agreements to be entered pursuant to the Interconnection and Pooling Agreement herein authorized.

BE IT FURTHER RESOLVED that all other provisions of the resolution of June 27, 1968 be and they are hereby declared to remain in full force and effect.

BE IT FURTHER RESOLVED that all actions taken by the Mayor of the City of Plaquemine, pursuant to said resolution, are hereby ratified, confirmed and adopted.

BE IT FURTHER RESOLVED that any resolution or ordinance in conflict herewith, or any provision thereof, be and the same is hereby repealed.

BE IT FURTHER RESOLVED that the Mayor of the City of Plaquemine is hereby authorized to do and perform all other acts and to sign all documents necessary to carry out the intent and purposes of this resolution.

Harry K. Gallagher
MAYOR

ATTEST:

Nell F. Haynie
CLERK

****

I, Mrs. Nell F. Haynie, hereby certify that I am the duly appointed Clerk of the City of Plaquemine, Louisiana.

I further certify that the above and foregoing is a true and correct copy of an excerpt of the minutes of the Special meeting of the Mayor and Board of Selectmen held on the 4th day of November, 1968, and of a resolution adopted at said meeting, as said minutes and resolution appear officially of record in my possession.

IN FAITH WHEREOF, witness my hand and impress of the official seal of the City of Plaquemine, Louisiana, this 4th day of November, 1968.

Nell F. Haynie
CLERK

R115

Plaquemine, Louisiana

The Mayor and Board of Selectmen of the City of Plaquemine, Iberville Parish, Louisiana, met in special session at the City Hall, in the City of Plaquemine, on Thursday, the 27th day of June, 1968, at 7:30 o'clock P. M., with the following members present:

	Charles P. Schnebelen	, Mayor
	Archie V. Callais	, Selectman
	Carroll Fiatau	, Selectman
	Warren J. Hebert, Jr.	, Selectman
	D. J. McDuffie	, Selectman
ABSENT:	Michael R. Eby	, Selectman

After the meeting had been called to order, the roll was read with the above results, and the Clerk then presented his affidavit evidencing the giving of proper notice of the calling of the meeting to each member of the Board, which affidavit was approved and filed.

On motion of Mr. McDuffie, seconded by Mr. Callais, the following resolution was adopted:

RESOLUTION

A RESOLUTION AUTHORIZING THE MAYOR OF THE CITY OF PLAQUEMINE TO SIGN AN INTERCONNECTION AND POOLING AGREEMENT WITH THE CITY OF LAFAYETTE, LOUISIANA, THE DOW CHEMICAL COMPANY AND THE LOUISIANA ELECTRIC COOPERATIVE, A COPY OF WHICH AGREEMENT IS ATTACHED TO THE RESOLUTION AND MARKED EXHIBIT "A" FOR REFERENCE.

WHEREAS, an interconnection and pooling agreement for receiving and supplying electric power has been drafted by representatives of the Cities of Plaquemine and Lafayette, the Dow Chemical Company and the Louisiana Electric Cooperative for the past several months; and,

R116

WHEREAS, Dow owns and operates an industrial plant in the vicinity of Plaquemine, Louisiana, which includes a large electric generating plant to supply steam and electricity for its operations, and the Cities of Lafayette and Plaquemine, Louisiana, own and operate municipal electric systems including generating facilities, and the Louisiana Electric Cooperative is a federated [illegible] which are electric distribution cooperatives and plans to build, own and operate electrical generating and transmission facilities to supply the power requirements of its members; and,

WHEREAS, the purpose of this agreement is to commit each of the parties named therein and to obligate each of said parties to furnish electric generation to each of the members of the interconnection pool, both on an emergency basis and on a normal basis.

NOW, THEREFORE, BE IT RESOLVED that the Mayor of the City of Plaquemine, be and he is hereby authorized, directed and empowered to sign the interconnection and pooling agreement, a copy of which is attached to this resolution, marked exhibit "A".

-1-

with the City of Lafayette, Louisiana, the Louisiana Electric Cooperative, Inc., and the Louisiana Electric Cooperative, Inc., providing the City of Plaquemine for a period of time [illegible] year and to enter a supplemental agreement for electric service which will be effective for a period of not more than five (5) years with the regard to the supply and purchase, by this municipality, of electricity, and to sign additional supplemental agreements for succeeding like periods thereafter, which are to be mutually agreed upon by the parties to this interconnection and pooling agreement.

BE IT FURTHER RESOLVED that the service schedule and the facilities schedule attached to the agreement one herewith, made a part of the authorization granted in this resolution, and the Mayor of the City of Plaquemine is authorized to [illegible] or initial the service schedule and the facilities schedule attached to the interconnection and pooling agreement.

BE IT FURTHER RESOLVED that the Mayor of the City of Plaquemine is hereby authorized to do and perform all other acts and to sign all documents necessary to carry out the intent and purposes of this resolution.

MAYOR

ATTEST:

CLERK

CERTIFICATE

I, Norma H. Tullier, hereby certify that I am the duly authorized and qualified Acting Clerk of the City of Plaquemine, Louisiana.

I further certify that the above and foregoing is a true and correct copy of an excerpt of the minutes of the special meeting of the Mayor and Board of Selectmen held on the 27th day of June, 1969, and of a resolution adopted at said meeting, as said minutes and resolution appear officially of record in my possession.

IN FAITH WHEREOF, witness my hand and impress of the official seal of the City of Plaquemine, Louisiana, on this [illegible] day of [illegible] 1969.

117 NORMA H. TULLIER, ACTING CLERK

APPENDIX C R118

POWER SALES AND TRANSMISSION AGREEMENT

Between

Central Louisiana Electric Company, Inc., Pineville, Louisiana

Gulf States Utilities Company, Beaumont, Texas

Louisiana Power & Light Company, New Orleans, Louisiana

and

Louisiana Electric Cooperative, Inc.

R 119

TABLE OF CONTENTS

	Page
ARTICLE I, GENERAL DEFINITIONS	2
Section 1. System of Companies	2
Section 2. Transmission Lines	2
Section 3. New Roads Plant	2
Section 4. Billing Month	3
Section 5. Points of Delivery	3
Section 6. Uncontrollable Force	3
Section 7. Member Cooperatives	3
Section 8. Commercial Operation	4
ARTICLE II, SCOPE OF AGREEMENT	4
ARTICLE III, CONSTRUCTION OF FACILITIES	5
Section 1. Construction of New Roads Plant	5
Section 2. Construction of Facilities for Interconnection at New Roads Plant	5
Section 3. Construction of Transmission Lines	5
Section 4. Long Range Planning	5
Section 5. Adequacy of Companies' Facilities	6
ARTICLE IV, SCHEDULING AND PLANT OPERATION	6
Section 1. Scheduling of New Roads Plant	6
Section 2. Limits on Scheduling of New Roads Plant	6
Section 3. Operation and Maintenance of New Roads Plant	7

R 120

	Page
ARTICLE V, TRANSMISSION SERVICE BY COMPANIES	7
Section 1. Transmission Service	7
Section 2. Estimate of Power Requirements for Member Cooperatives	7
Section 3. Transmission Service Billing Demand	8
Section 4. Rate for Transmission Service	8
ARTICLE VI, SALE AND PURCHASE OF EXCESS CAPACITY OF PLANT	9
Section 1. Determination of Excess Capacity	9
Section 2. Rate for Excess Capacity	10
ARTICLE VII, SALE AND PURCHASE OF ADDITIONAL POWER REQUIREMENT	10
Section 1. Additional Power Requirement	10
Section 2. Rate for Additional Power Requirement	11
ARTICLE VIII, ENERGY	11
Section 1. Monthly Energy Delivery	11
Section 2. Rate for Energy	11
Section 3. Payment for Power Plant Fuel	11
ARTICLE IX, CAPABILITY AND HEAT RATE OF NEW ROADS PLANT	12
Section 1. Determination of Capability of New Roads Plant	12
Section 2. Determination of Heat Rate of New Roads Plant	13

R121

	Page
ARTICLE X, START-UP AND TEST POWER AND ENERGY	13
Section 1. Furnishing of Start-Up Power and Energy	13
Section 2. Test Power and Energy	13
Section 3. Metering	14
Section 4. Settlement for Start-Up and Test Power and Energy	14
ARTICLE XI, ADDITION OF, CHANGES IN AND ABANDONMENT OF POINTS OF DELIVERY	14
Section 1. Addition of and Changes in Points of Delivery	14
Section 2. Abandonment of or Reduction in Capacity of Point of Delivery	15
Section 3. Amendment of Exhibit A	16
ARTICLE XII, METERING, ACCOUNTING, BILLING AND PAYMENT	16
Section 1. Metering	16
Section 2. Meter Reading	16
Section 3. Taxes and Other Governmental Charges	17
Section 4. Monthly Statement	17
Section 5. Monthly Payment	18
ARTICLE XIII, GENERAL PROVISIONS	18
Section 1. Redetermination of Rates	18
Section 2. Reliability and Adequacy of Service	19
Section 3. Continuity of Deliveries	19
Section 4. Facilities to be Furnished	19

Page

ARTICLE XIII, GENERAL PROVISIONS (con't)

Section 5. Operation of LEC and Cooperative Facilities ---------- 20

Section 6. Meter Tests ---------- 21

Section 7. Standards for Construction, Maintenance and Operation of Equipment ---------- 22

Section 8. Right of Installation and Access ---------- 23

Section 9. Right of Removal ---------- 24

ARTICLE XIV, TERM OF AGREEMENT ---------- 24

ARTICLE XV, REGULATION ---------- 25

Section 1. Proposed Legislation ---------- 25

Section 2. Termination in Event of Non-Enactment ---------- 26

Section 3. Power and Energy to be For Distribution Solely by Member Cooperatives ---------- 26

Section 4. Cancellation of Agreements in Conflict With This Agreement ---------- 26

ARTICLE XVI, REMEDIES, WAIVERS, NOTICES AND SUCCESSORS--- 27

Section 1. Remedies of Parties ---------- 27

Section 2. Waivers ---------- 27

Section 3. Companies' Operating Agent ---------- 27

Section 4. Notices ---------- 28

7-17-
R 173

THIS AGREEMENT, made and entered into this _____ day of _____, by and between CENTRAL LOUISIANA ELECTRIC COMPANY, INC., Pineville, Louisiana; GULF STATES UTILITIES COMPANY, Beaumont, Texas; and LOUISIANA POWER & LIGHT COMPANY, New Orleans, Louisiana ("Companies") and LOUISIANA ELECTRIC COOPERATIVE, INC. ("LEC")

WHEREAS, the Companies are engaged, inter alia, in the business of generating, transmitting and distributing electric power and energy in and to various parts of the State of Louisiana; and

WHEREAS, the Companies are now supplying the electric service requirements of certain rural electric cooperative members of LEC; and

WHEREAS, LEC has obtained from the Rural Electrification Administration a loan to finance the construction of a 200,000 kilowatt (kw) steam electric generating plant to be located in the vicinity of New Roads, Louisiana ("New Roads Plant") and related substation facilities; and

WHEREAS, LEC proposes to provide generating capacity for some of its member cooperatives which presently purchase power from the Companies; and

WHEREAS, the Companies own and operate transmission and related facilities now serving certain of LEC's member cooperatives and are willing to construct and operate additional transmission and related facilities necessary to connect the proposed plant to the transmission system of the Companies and are willing to use such existing and proposed facilities for the transmission of LEC power and energy from

the proposed plant to LEC's member cooperatives listed on Exhibit "A"; and

WHEREAS, LEC and the Companies find it mutually advantageous to enter into a long term agreement providing for purchase and sale of power and energy, and for transmission service by the Companies for LEC's power and energy whereby a separate transmission system constructed by LEC will not be required; and

WHEREAS, in order to obtain maximum operational efficiency and the greatest economic benefit in the utilization of the respective generating facilities of the parties, the parties desire to enter into contractual arrangements which will provide for integrating the operation of the New Roads Plant with the other power sources available to the Companies.

NOW, THEREFORE, in consideration of the premises and mutual covenants herein contained, the parties hereto agree as follows:

ARTICLE I.

GENERAL DEFINITIONS

Section 1. System of Companies. Any reference to the system of the Companies shall mean the transmission and distribution lines and related facilities used by the Companies for the transmission of power and energy under this Agreement.

Section 2. Transmission Lines. Transmission lines shall be those lines operating at 69 kv and above.

Section 3. New Roads Plant. The term "New Roads Plant" shall mean the thermal-electric generating plant to be constructed by LEC at or near New Roads,

ARTICLE I, Section 3 (con't) --

Louisiana, consisting of 2-100,000 kw units (nominal rating) together with a substation, including step-up transformer, all necessary facilities, terminals, and equipment to provide for connection to the system of the Companies.

Section 4. Billing Month. The term "Billing Month" shall mean the period between regular monthly meter readings as set forth in Article XII, Section 2.

Section 5. Points of Delivery. The term "Points of Delivery" shall mean (a) the points at which the Companies' facilities are connected to the facilities of LEC's Member Cooperatives at the locations set forth in Exhibit A, hereto, and (b) the New Roads Plant when it is out of service for maintenance or other reasons (limited to delivery of power and energy for use at New Roads Plant), through which points power and energy are delivered by Companies under this Agreement for the account of LEC.

Section 6. Uncontrollable Force. The term "Uncontrollable Force" shall mean any force which is not within the control of the party affected, and which by exercise of due diligence and foresight could not reasonably have been avoided, including, but not limited to, failure of facilities, flood, earthquake, storm, lightning, fire, epidemic, war, riot, civil disturbance, labor disturbance, sabotage, or restraint by court or public authority having jurisdiction.

Section 7. Member Cooperatives. The term "Member Cooperatives" shall mean the Cooperative Members of LEC listed in Exhibit A attached hereto.

ARTICLE I (con't) --

Section 8. Commercial Operation. Each unit of the New Roads Plant shall be deemed to be in "Commercial Operation" when the parties hereto mutually agree that such a unit is capable of producing and delivering rated output continuously and reliably. The New Roads Plant shall be deemed to be in "Commercial Operation" when the parties hereto mutually agree that both 100,000 kw units are in "Commercial Operation."

ARTICLE II

SCOPE OF AGREEMENT

During the term of this Agreement, the Companies shall deliver all of the electric power and energy necessary to fulfill the total electric service requirements of the Member Cooperatives which are set forth in Exhibit A attached hereto and made a part hereof and as it may hereafter be amended pursuant to Article XI. It is agreed that Exhibit A constitutes a specification of the delivery capacity and character of service at each Point of Delivery.

LEC shall operate the New Roads Plant as scheduled by the Companies, as provided in Article IV hereof, and deliver the schedule output into the system of the Companies.

LEC shall sell and Companies shall purchase Excess Capacity in the New Roads Plant, as defined in Article VI hereof. Power required by LEC for service to the Member Cooperatives under this Agreement at the Points of Delivery listed in Exhibit A hereto, in excess of the capability of the New Roads Plant shall be sold by the Companies and purchased by LEC, as provided in Article VII hereof.

ARTICLE II (con't) --

Accounting and compensation for power and energy as between the parties to this Agreement shall be in accordance with Article XII hereof.

ARTICLE III

CONSTRUCTION OF FACILITIES

Section 1. Construction of New Roads Plant. It is the intention of LEC that the New Roads Plant shall be completed and ready for Commercial Operation by June 1, 1972.

Section 2. Construction of Facilities for Interconnection at New Roads Plant. LEC shall provide a substation, including step-up transformer, all necessary facilities, terminals, and equipment at the New Roads Plant to permit interconnection by the Companies of the transmission lines covered by Section 3 of this Article III to LEC's bus at a voltage mutually agreeable to the parties hereto.

Section 3. Construction of Transmission Lines. The Companies shall construct, or cause to be constructed, adequate transmission lines to the point of interconnection at the New Roads Plant provided in Section 2 of this Article III. The lines shall be completed and ready for operation on or before the date the New Roads Plant is ready for start-up and testing.

Section 4. Long Range Planning. The parties hereto recognize that long range planning is essential in rendering adequate and economical electric service to customers and that such planning will be mutually beneficial to the parties in performing

ARTICLE III, Section 4 (con't) --

their obligations under this Agreement. Therefore, the parties agree to cooperate in making studies and developing such information as may be useful in the planning of the most effective arrangement of future facilities which may be necessary.

Section 5. Adequacy of Companies' Facilities. The Companies obligate themselves to have at all times adequate capacity in the system of the Companies to perform the services covered by this Agreement.

ARTICLE IV

SCHEDULING AND PLANT OPERATION

Section 1. Scheduling of New Roads Plant. The New Roads Plant, when completed, shall be connected by means of communication and load control facilities with the dispatching facilities of the Companies so as to integrate the operation of said Plant with the system of the Companies. Companies shall, at all times during the term hereof, have full control over the scheduling of the power and energy available at the New Roads Plant. Scheduling by the Companies shall be in accordance with the procedures then used by the Companies in scheduling their own generating facilities.

Section 2. Limits on Scheduling of New Roads Plant. Companies shall not schedule power and energy from the New Roads Plant in any amount at any time greater or lesser than the safe generating limits of the Plant, but Companies may, at their sole option, schedule zero kilowatts from the New Roads Plant for such periods of time as Companies determine. The rate at which generation at the New Roads Plant is increased or decreased by Companies shall be in accordance with good utility operating practices.

ARTICLE IV (con't) --

Section 3. Operation and Maintenance of New Roads Plant. LEC shall operate and maintain the New Roads Plant in accordance with good accepted utility practices and in such manner as may be necessary to permit the delivery of power and energy as scheduled by the Companies. LEC will not shut the New Roads Plant down for repair or maintenance, except for emergency conditions or when required to protect equipment from serious damage, without the consent of the Companies and will co-ordinate and schedule normal maintenance or repair shutdowns with the Companies.

ARTICLE V

TRANSMISSION SERVICE BY COMPANIES

Section 1. Transmission Service. Commencing on the first day of the month following the date the first 100,000 kw unit of the New Roads Plant is ready for Commercial Operation, the Companies shall deliver for the account of LEC to the Member Cooperatives and LEC at the Points of Delivery and voltage listed in Exhibit A such amounts of power and energy as are required at such Points of Delivery, up to the amount of capacity at each Point of Delivery as specified under this Agreement.

Section 2. Estimate of Power Requirements for Member Cooperatives. At least eighteen months prior to June 1 of each year LEC shall notify the Companies in writing of the maximum amount of power which LEC estimates the Companies will be called upon to deliver to each Point of Delivery during the 12-month period following such June 1.

ARTICLE V (con't) --

Section 3. Transmission Service Billing Demand. Transmission Service Billing Demand shall be the following:

The arithmetical sum of the maximum 15-minute kw demands established at the Member Cooperatives' Points of Delivery as specified in Exhibit A (as amended from time to time) during the Billing Month of the 12 months period ending with the current Billing Month when such arithmetical sum was highest; provided that each Point of Delivery shall be included in the determination of the monthly arithmetical sum of maximum 15-minute kw demands at not less than 50% of the kw capacity specified for such Point of Delivery under this Agreement subject to Section 2 of Article XI with respect to Points of Delivery which have been abandoned or reduced in capacity or 50% of the maximum 15-minute kw demand established at such Points of Delivery subsequent to the last change in specified capacity, whichever is greater (Minimum Billing Demand).

If the power factor at the point of measurement for any Point of Delivery is found to be less than 85%, one kva will be considered as .85 kw but not less than actual kw.

Section 4. Rate for Transmission Service. The rate for transmission service which shall be paid by LEC to Companies shall, until changed in accordance with Section 1 of Article XIII, hereof, be 60 cents per kw of Transmission Service Billing Demand per Billing Month.

ARTICLE V, Section 4 (con't) --

Where LEC or a Member Cooperative provides all facilities at the Point of Delivery for the receipt and the transformation of energy delivered hereunder from transmission voltage to Cooperative's distribution voltage, pursuant to Article XI, a discount of 10 cents per kw per month will be allowed on the billing under the above rate for the demand at that Point of Delivery.

ARTICLE VI

SALE AND PURCHASE OF EXCESS CAPACITY OF PLANT

Section 1. Determination of Excess Capacity. Beginning on June 1, following the date the New Roads Plant is ready for Commercial Operation, but not before June 1, 1972, LEC will sell and Companies will purchase any Excess Capacity of the New Roads Plant not required for providing service to Member Cooperatives under this Agreement and determined as hereinafter provided. For purposes of this Agreement, "Excess Capacity" shall mean the amount, if any, by which (a) the capability of the New Roads Plant determined as provided in Article IX, hereof, exceeds (b) 1.10 times the sum of the non-simultaneous maximum 15-minute demand at each Member Cooperative Point of Delivery during the 12 months ending with the current Billing Month (including maximum demands which may have occurred prior to commencement of service under this Agreement). In the event the New Roads Plant is shut down because of breakdown or emergency for a period exceeding 30 consecutive days, Companies shall during the period of such shutdown be released from the obligation imposed by this Section 1. In the event the capability of the New Roads Plant is curtailed for any

ARTICLE VI, Section 1 (con't) --

reason, other than scheduled maintenance, for a period exceeding 30 consecutive days, the reduced capability shall be used in place of the capability defined in (a) of the second sentence of this Section 1 during the period of such reduction in capability in determining Excess Capacity.

Section 2. Rate for Excess Capacity. The rate applicable to any Excess Capacity purchased under this Article VI shall, until changed in accordance with Section 1 of Article XIII hereof, be $1.15 per kw per Billing Month.

ARTICLE VII

SALE AND PURCHASE OF ADDITIONAL POWER REQUIREMENT

Section 1. Additional Power Requirement. Beginning with the first month in which the power requirements of the Member Cooperative Points of Delivery served under this Agreement computed as (b) under Section 1 of Article VI, hereof, exceed the total capability of the New Roads Plant determined as provided in Article IX, hereof, the excess shall constitute Additional Power Requirement which shall be provided and sold by Companies and purchased by LEC. Such Additional Power Requirement as so established shall be applicable for twelve months or until a higher Additional Power Requirement is established. In the event the capability of the New Roads Plant is curtailed for any reason, other than scheduled maintenance, for a period exceeding 30 consecutive days, the reduced capability shall be used in place of the total capability of the New Roads Plant determined as provided in Article IX during the period of such reduction in capability in determining Additional Power Requirement.

ARTICLE VI, Section 1 (con't) --

reason, other than scheduled maintenance, for a period exceeding 30 consecutive days, the reduced capability shall be used in place of the capability defined in (a) of the second sentence of this Section 1 during the period of such reduction in capability in determining Excess Capacity.

Section 2. Rate for Excess Capacity. The rate applicable to any Excess Capacity purchased under this Article VI shall, until changed in accordance with Section 1 of Article XIII hereof, be $1.15 per kw per Billing Month.

ARTICLE VII

SALE AND PURCHASE OF ADDITIONAL POWER REQUIREMENT

Section 1. Additional Power Requirement. Beginning with the first month in which the power requirements of the Member Cooperative Points of Delivery served under this Agreement computed as (b) under Section 1 of Article VI, hereof, exceed the total capability of the New Roads Plant determined as provided in Article IX, hereof, the excess shall constitute Additional Power Requirement which shall be provided and sold by Companies and purchased by LEC. Such Additional Power Requirement as so established shall be applicable for twelve months or until a higher Additional Power Requirement is established. In the event the capability of the New Roads Plant is curtailed for any reason, other than scheduled maintenance, for a period exceeding 30 consecutive days, the reduced capability shall be used in place of the total capability of the New Roads Plant determined as provided in Article IX during the period of such reduction in capability in determining Additional Power Requirement.

ARTICLE VII (con't) --

Section 2. Rate for Additional Power Requirement. The rate for Additional Power Requirement sold and purchased under this Article VII until changed in accordance with Section 1 of Article XIII hereof, shall be $1.15 per kw per Billing Month.

ARTICLE VIII

ENERGY

Section 1. Monthly Energy Delivery. For each Billing Month during which Companies deliver power and energy under this Agreement, the total monthly energy billed shall be the total of the kilowatt hours (kwh) of energy delivered to each of the Points of Delivery listed in Exhibit A, adjusted upward by 5% for transmission losses. LEC shall pay Companies for the total monthly energy billed, as so computed, at the rate provided in Section 2 of this Article VIII.

Section 2. Rate for Energy. The rate for energy delivered during each month shall be an amount per kwh equivalent to fuel cost per kwh for the New Roads Plant. Such fuel cost per kwh shall be calculated for each month on the basis of the heat rate of the New Roads Plant determined as provided in Article IX hereof, and the applicable rate for gas, including applicable taxes and other charges, at the New Roads Plant under the contract for power plant fuel between LEC and _____, dated _____, _____, (a copy of which has been furnished to Companies) or any subsequent applicable contract for power plant fuel.

Section 3. Payment for Power Plant Fuel. In consideration of the payment by LEC for energy as provided in this Article VIII and Companies' right to schedule generation

ARTICLE VIII, Section 3 (con't) --

at the New Roads Plant under this Agreement, Companies will reimburse LEC monthly for the power plant fuel purchased by LEC under its contract with _____ _____ dated _____, _____; beginning with fuel burned in the month following the date the New Roads Plant is ready for Commercial Operation. LEC will furnish to Companies a copy of the monthly bill it receives from _____ for gas used at the New Roads Plant. Within ten days after receipt of each such monthly bill, Companies shall audit such bill and reimburse LEC after agreement on the amount thereof.

It is agreed that, so long as this Agreement is in effect, the rights of LEC as Buyer under the contract between LEC and _____ dated _____, _____, shall be exercisable by Companies and LEC shall give only such written notices under said contract as shall be determined by Companies.

ARTICLE IX

CAPABILITY AND HEAT RATE OF NEW ROADS PLANT

Section 1. Determination of Capability of New Roads Plant. The capability of the New Roads Plant shall be net generating capability at point of interconnection with Companies based on normal steam pressure and temperature with all feed water heaters in service, corrected to maximum cooling water temperature. The determination of such capability shall be based on tests conducted jointly by LEC and Companies at mutually agreed times; provided, that either party shall have the right to require

ARTICLE IX, Section 1 (con't) --

a new test at any time not sooner than twelve months after the last previous test.

Section 2. Determination of Heat Rate of New Roads Plant. The heat rate of the New Roads Plant for purposes of calculating fuel cost per kwh under this Agreement shall be the heat rate per net kwh generated based on the efficiency of the plant loaded at 50% of the capability established under Section 1 of Article IX, corrected to maximum cooling water temperature. The determination of such heat rate shall be based on tests conducted jointly by LEC and Companies at mutually agreed times; provided, that either party shall have the right to require a new test at any time not sooner than twelve months after the last previous test.

ARTICLE X

START-UP AND TEST POWER AND ENERGY

Section 1. Furnishing of Start-Up Power and Energy. Beginning at the time the New Roads Plant is prepared for start-up and testing, Companies shall furnish and deliver to the point of interconnection at the New Roads Plant such power and energy as may be required by LEC in connection with starting up and testing procedures.

Section 2. Test Power and Energy. During the period from the beginning of start-up and testing of the New Roads Plant up to the first of the month following the date the plant is ready for Commercial Operation, LEC shall deliver into the system of Companies and Companies shall receive, and accept the power and energy which LEC generates at the New Roads Plant. Testing of the New Roads Plant shall be conducted at times mutually agreeable to LEC and Companies.

ARTICLE X (con't) --

Section 3. Metering. Prior to beginning start-up procedures at the New Roads Plant, LEC shall provide in place metering facilities adequate to accurately record the flow of energy under Section 1 and 2 of this Article X.

Section 4. Settlement for Start-Up and Test Power and Energy. Settlement for start-up and test power and energy shall be on the basis of the payment by Companies to LEC for the net energy input into the system of Companies under Section 2 of this Article X, after deducting the energy delivered by Companies under Section 1 of this Article X. The rate applicable to such energy shall be 1.5 mills per kwh.

ARTICLE XI

ADDITION OF, CHANGES IN AND ABANDONMENT OF POINTS OF DELIVERY

Section 1. Addition of and Changes in Points of Delivery. Upon reasonable advance written notice from LEC, the Companies will provide additional capacity at the Points of Delivery specified in Exhibit A as the Member Cooperatives' load growth warrants such additions. The Companies will establish new Points of Delivery upon reasonable advance written notice from LEC, at such points where sound engineering and economic principles would dictate that the requested facilities be constructed if the transmission line in question and the distribution facilities to be served belonged to one owner.

ARTICLE XI, Section 1 (con't) --

Notwithstanding the above, the Companies may, as a condition precedent to the construction of any additional facilities to provide additional capacity at existing Points of Delivery or to establish new Points of Delivery, require such assurance of revenue to the Companies as may be reasonably necessary to justify the investment required for the facilities to be installed. Deliveries will be at nominal voltages mutually agreeable to the parties.

Metering shall, wherever practicable, be at distribution voltage with adjustment for transformation losses at 1%.

Section 2. Abandonment of or Reduction in Capacity of Point of Delivery. Upon reasonable advance written notice to Companies, LEC may abandon any Point of Delivery or may reduce the amount of capacity previously specified under this Agreement for any Point of Delivery. Such abandonment or reduction in capacity shall become effective on the date specified by LEC in the notice, but not sooner than 12 months after the date such notice is received by Companies; provided, that in calculating Minimum Billing Demand under the provisions of Section 3 of Article V such Point of Delivery shall be included as though such abandonment or reduction in capacity capacity had not taken place until the twenty-fifth month following the month in which notice of the reduction in capacity or abandonment is given.

ARTICLE XI (con't) --

Section 3. Amendment of Exhibit A. Exhibit A to this Agreement shall be amended each time there is an addition or abandonment of a Point of Delivery or a change in specified capacity at a Point of Delivery as provided in this Article XI.

ARTICLE XII

METERING, ACCOUNTING, BILLING AND PAYMENT

Section 1. Metering. LEC shall provide metering installations at each Point of Delivery to its Member Cooperatives adequate to accurately register both the power and energy passing through such point. The Companies may, at their option, install meters of their own at any of the Points of Delivery and shall use the readings of any such meters which they may provide for billing purposes under this Agreement. In the absence of Company-owned meters, billing shall be based on the readings of LEC's meters. At the New Roads Plant, LEC shall provide suitable metering installations to register at the point of interconnection to the system of the Companies the net output of the plant and the net input to the plant.

Section 2. Meter Reading. Each meter and check meter installed or used under this Agreement shall be read by the owner on or about the first day of each month, and may be simultaneously read by a representative of the other party if the other party so elects. In any case where only LEC meters are installed and the Companies elect not to have a representative present at the monthly reading of the meters, LEC shall by the second business day of the month furnish Companies the kw and kwh readings.

ARTICLE XII (con't) --

Section 3. Taxes and Other Governmental Charges. In addition to the rates provided in this Agreement for payment by one party to the other, each party shall pay, or shall reimburse the other for, all sales, use, privilege and excise taxes or other charges or exactions of any governmental unit levied, subsequent to the effective date of this Agreement, on the basis of the service rendered under this Agreement, the revenue therefrom or the facilities used in rendering service hereunder (excepting income and ad valorem taxes). Where such tax, charge or exaction is based on property and facilities which are used partly for performance under this Agreement and partly for other uses, the other party shall be responsible under this Section for only such part of such tax, charge or exaction as shall be proportional to the use of such property or facilities in performance under this Agreement.

Section 4. Monthly Statement. On or before the 12th day of each month the Companies shall prepare, in necessary detail, and submit to LEC at its office at New Roads, Louisiana, a statement covering the preceding Billing Month setting forth the aggregate Transmission Service Billing Demand for said month as determined in accordance with Section 3 of Article V, the aggregate amount of energy delivered during said month computed in accordance with Section 1 of Article VIII, any Excess Capacity for such month computed as provided in Section 1 of Article VI, any Additional Power Requirement computed in accordance with Section 1 of Article VII, and, on the monthly statement for the first month following the date the New Roads Plant is ready for Commercial Operation, the net start-up and testing energy as provided in Section 4 of Article X. Such statement shall show the amount due

ARTICLE XII, Section 4 (con't) --

either party for each of such items based on the rates applicable under this Agreement and the net total due by one party to the other.

Section 5. Monthly Payment. On or before the 10th day after the submission of the monthly statement by Companies, which date shall be shown as the due date, the party owing the net total shall make payment thereof to the other party. Payments to the Companies shall be made in care of Companies' Operating Agent, designated as provided in Section 3 of Article XVI. Payments to LEC shall be made in care of its Manager, New Roads, Louisiana. Interest on unpaid amounts shall accrue at the rate of 8% per annum from and after the due date. If LEC in good faith disagrees with the statement rendered by Companies, it shall so notify Companies prior to the due date. If the parties are unable to resolve any such matter by agreement, it may be determined by any regulatory body or court having jurisdiction. Interest at the rate of 8% per annum shall apply on any amount found owing by one party to another from due date until paid, or in case of a refund due, from date of original payment until refunded.

ARTICLE XIII

GENERAL PROVISIONS

Section 1. Redetermination of Rates. After May 30, 1982, and subject to necessary regulatory approvals, the rates of compensation as provided in this Agreement, at the option of the party who provides the service to which any such rate is applicable, shall be subject to adjustment at suitable intervals on at least 24 months advance written notice; provided that the other party shall have the right to terminate the

ARTICLE XIII, Section 1 (con't) --

Agreement as of the effective date of the adjusted rate or rates by written notice given at least 18 months prior to such date, if such other party, in its sole judgment, is not satisfied that it remains economically feasible for it to continue to take the service herein provided at the adjusted rate or rates.

Section 2. Reliability and Adequacy of Service. Electric service rendered by the Companies and LEC under this Agreement shall meet accepted standards of reliability and adequacy. LEC shall not impose loads on the system of Companies that will result in objectionable voltage fluctuations or cause interference in service to other customers of Companies. If questions are raised concerning the quality of service, factual data shall be obtained with respect to the character of such service and appropriate corrective or remedial action shall be promptly taken by any party at fault.

Section 3. Continuity of Deliveries. Electric power and energy delivered under this Agreement shall be furnished continuously and/or as scheduled except for interruptions or curtailments in service necessary for installation, maintenance, repair or replacement of equipment or caused by an Uncontrollable Force. Interruptions or curtailments in service covered by the first sentence of this Section 3 shall not constitute a breach of this Agreement, and neither party shall be liable to the other for damages resulting therefrom.

Section 4. Facilities to be Furnished. The Companies and LEC shall each furnish, install, maintain and operate, or cause to be furnished, installed, maintained and operated, such facilities and equipment as may be necessary to enable them to fulfill

ARTICLE XIII, Section 4 (con't) --

their respective obligations under this Agreement, and to assure reasonable protection to the facilities of the other party hereto. Plans for the installation of protective equipment and devices on or in connection with facilities used under this Agreement shall be submitted to the other party for approval before such equipment is installed, but such approval shall not be construed to constitute a guaranty of the adequacy of any such equipment or devices. LEC and Companies shall install, operate, and maintain, or cause to be installed, operated, and maintained, on their respective systems such equipment as may be required to afford a communication system between the New Roads Plant and the office dispatching power and energy for Companies' systems, such equipment as may be required to telemeter information and data necessary for operations under this Agreement, and equipment to provide automatic load control as specified by Companies. Lease rentals and/or suitable annual facilities charges on any equipment or circuits required under this Section 4 shall be apportioned equitably between the Companies and LEC.

Section 5. Operation of LEC and Cooperative Facilities. LEC and its Member Cooperatives agree that they will not operate that part of their transmission and/or distribution system supplied with electric power and energy under this Agreement at each Point of Delivery in parallel or in synchronism with any other part of their transmission and/or distribution system that is supplied with electric power and energy from any other Point of Delivery where it receives power and energy under this Agreement, except that, in cases of proper notification to the Companies, LEC or the

ARTICLE XIII, Section 5 (con't) --

Member Cooperatives may, during an emergency, parallel two Points of Delivery under this Agreement for purposes of switching so that they may avoid interruption of service. During such emergency operation for convenience of LEC or its Member Cooperatives, Companies will not be responsible for any damages which might result from such operation, and LEC and its Member Cooperatives agree to hold Companies harmless against any and all claims for damages which might result from said operations.

Section 6. Meter Tests. (a) Each meter used under this Agreement shall be tested and calibrated by the owner at its own expense at regular intervals of not more than one year. If a meter shall be found incorrect or inaccurate, it shall be restored to an accurate condition or a new meter shall be substituted.

(b) Either party shall have the right to request that a special meter test be made of meters owned by the other party at any time and may be present at such test. If any special test discloses that the meter tested is registering correctly, or within 2% of normal, the party requesting the test shall bear the expense of such test. The expense of all other tests of meters shall be borne by the owner of the meters.

(c) The results of all such tests and calibrations shall be open to examination by the other party and a report of every test shall be furnished immediately to the other party. Any meter tested and found to be not more than 2% above or below normal shall be considered to be correct and accurate insofar as correction of billing is con-

ARTICLE XIII, Section 6 (con't) --

concerned. If, as a result of any test, any meter is found to register in excess of 2% either above or below normal, then the reading of such meter previously used for billing purposes shall be corrected according to the percentage of inaccuracy so found, but no such correction shall extend beyond 90 days previous to the day on which the inaccuracy is discovered by such test, nor in any event beyond the date when the meter was last calibrated and tested, and such correction when made shall constitute full adjustment of any claim between the parties hereto arising out of such inaccuracy of metering equipment.

(d) For any period that a meter is found to have failed to register, it shall be assumed that the demand established, or electric energy supplied, as the case may be, during said period is the same as that for a period of like operation, to be agreed upon by the parties hereto, during which such meter was in service and operating; provided that if both Companies and LEC meters are installed at a location and the Companies meter or meters should fail to register, the readings of the LEC meters shall be used for billing purposes hereunder.

Section 7. Standards for Construction, Maintenance and Operation of Equipment.

(a) Each party (with LEC acting for itself and its Member Cooperatives) agrees with the other party that it will construct and at all times maintain its lines, equipment and other facilities in accordance with standards and specifications at least equal to those provided by the National Electrical Safety Code of the United States Bureau of Standards and will at all times operate same in such manner as not to interfere with

ARTICLE XIII, Section 7 (con't) --

service to the customers of the other party.

(b) If LEC or any Member Cooperative should fail to maintain and operate its lines, equipment and other facilities as provided in paragraph (a) above, the Companies shall have the right to discontinue receipt of electric power and energy from or delivery into the facilities in question, after giving notice of its intention to do so. If the Companies should be advised of, or have knowledge of, hazardous conditions existing on the lines, equipment or other facilities of LEC or any Member Cooperative, the Companies shall have the right to immediately discontinue receipt from or delivery to such facilities, until the hazardous conditions have been removed and the lines and other facilities shall have been placed in a safe operating condition; the Companies shall, however, notify LEC or the Member Cooperative as soon thereafter as reasonably possible of the cause for such discontinuance and shall restore service immediately when such cause has been removed. In either of these events, LEC and the Member Cooperative shall hold the Companies free and unharmed against any and all claims, liabilities, loss or expense resulting from such discontinuance of receipt or delivery by Companies, except such as results from the negligence of Companies, their agents or employees.

Section 8. Right of Installation and Access. (a) Each party (with LEC acting for itself and its Member Cooperatives) grants to the other permission to install, maintain and operate, or cause to be installed, maintained and operated, on its premises

R146

any and all equipment, apparatus and devices necessary in the performance of this Agreement, except as otherwise specifically provided herein.

(b) Each party hereto (with LEC acting for itself and its Member Cooperatives) shall permit duly authorized representatives and employees of the other to enter upon its premises for the purpose of reading or checking meters, inspecting, testing, repairing, renewing or exchanging any or all of the equipment owned by the other party located on such premises, or for the purpose of performing any other work necessary in the performance of this Agreement.

Section 9. Right of Removal. Any and all equipment, apparatus, devices or facilities placed or installed or caused to be placed or installed, by either of the parties hereto on or in the premises of the other party or of a Member Cooperative shall be and remain the property of the party owning and installing such equipment, apparatus, devices or facilities, regardless of the mode or manner of annexation or attachment to real property of the other and, upon the termination of this Agreement, the owner thereof shall have the right to enter upon such premises and shall, within a reasonable time, remove such equipment, apparatus, devices or facilities.

ARTICLE XIV

TERM OF AGREEMENT

This Agreement shall not be binding upon the parties hereto until approved by the Administrator of the Rural Electrification Administration of the United States of

ARTICLE XIV (con't) --

America and by any state or federal regulatory bodies having jurisdiction. This Agreement shall remain in force and effect from the date of the last of such required approvals until midnight May 30, 1992, and thereafter for successive 5-year terms, unless terminated pursuant to the provisions of Section 1 of Article III, Section 1 of Article XIII, or Section 2 of Article XV; provided that either party hereto may terminate this Agreement as of May 30, 1992, or as of the end of any 5-year term thereafter upon not less than 36 months advance written notice to the other party.

ARTICLE XV

REGULATION

Section 1. Proposed Legislation. The parties recognize that the effectiveness and stability of operations under this Agreement are dependent upon all of the parties and the Member Cooperatives of LEC, individually, assuming the responsibilities generally accepted by public utilities and according respect to the relationship existing between the parties and their customers. The Companies and LEC (acting for itself and for all the Cooperatives comprising its membership, individually) agree that they will join together in seeking enactment into law, legislation which will serve to accomplish these objectives. This legislation will be sought at the next session of the Legislature at which such legislation may be introduced after _____, 19___. Attached to this Agreement as Exhibit "B" and made a part hereof, is a draft of a proposed legislative act agreed upon by the parties as acceptable and one which they will jointly sponsor and work to have enacted.

ARTICLE XV (con't) --

Section 2. Termination in Event of Non-Enactment. In the event a bill or bills in the form of the aforementioned Exhibit "B," or a bill or bills incorporating in total the substance of the provisions of Exhibit "B" are not enacted into law at the session of the Louisiana Legislature, at which it was introduced, this Agreement may be terminated by any one of the Companies or LEC by giving notice of termination in writing to the other parties. Termination shall be effective immediately upon delivery of the notice.

Section 3. Power and Energy to be For Distribution Solely by Member Cooperatives. Power and energy transmitted by the Companies under this Agreement to Points of Delivery shall be used by the Member Cooperatives in serving their customers. Such power and energy will not be resold or delivered by LEC or a Member Cooperative to any other electric distribution system operated on a utility basis, other than a Member Cooperative, whether owned or operated by an individual or association, by a cooperative, by an investor-owned corporation, or by a municipality or any other subdivision or agency of the State or Federal Government.

Section 4. Cancellation of Agreements in Conflict With This Agreement. LEC agrees to take all necessary steps to cancel, extinguish and terminate that certain Pooling and Interchange Agreement between it, Dow Chemical Corporation, the City of Plaquemine, Louisiana, and the City of Lafayette, Louisiana, approved by the Rural Electrification Administration on November 19, 1968, prior to the effective

ARTICLE XV, Section 4 (con't) --

date of this Agreement. If LEC is unable or fails to obtain said cancellation, extinction or termination within the time specified, then the Companies may withdraw from this Agreement and it shall be of no effect. Further, LEC agrees to save and hold the Companies harmless from any claims of whatever nature arising out of or resulting from the abovesaid cancellation, extinction and termination of said Pooling and Interchange Agreement.

ARTICLE XVI

REMEDIES, WAIVERS, NOTICES AND SUCCESSORS

Section 1. Remedies of Parties. Except as otherwise specifically provided, nothing contained in this Agreement shall be construed to abridge, limit, or deprive any of the parties hereto of any means of enforcing any remedy which it might otherwise have, either at law or in equity, including the right, if any, of injunction and specific performance, for the breach of any of the provisions hereof.

Section 2. Waivers. Waiver at any time of rights with respect to a default or any other matter arising in connection with this Agreement shall not be deemed to be a waiver with respect to any subsequent default or matter.

Section 3. Companies' Operating Agent. The Companies shall constitute and appoint a true and lawful agent (herein referred to as the "Companies' Operating Agent") who shall be authorized to:

ARTICLE XVI, Section 3 (con't) --

a) Schedule and accept delivery of power and energy from the LEC's New Roads Plant.

b) Prepare and submit to LEC on behalf of the Companies any and all schedules, notices, and payments provided for in this Agreement.

c) Receive and accept from LEC on behalf of the Companies any and all schedules, notices and payments provided for in this Agreement.

The Companies hereby appoint Gulf States Utilities Company as Companies' Operating Agent under this Agreement. The Companies covenant and agree that the authority invested in Gulf States Utilities Company or any successor operating agent shall not be revoked unless and until a successor Companies' Operating Agent is appointed and authorized to act by the Companies. The appointment of any such successor Companies' Operating Agent shall be evidenced by written notice by each Company to LEC.

Section 4. Notices. Any written notice, demand or request required or authorized under this Agreement shall be deemed properly given to or served on LEC if mailed to:

Louisiana Electric Cooperative, Inc.
New Roads, Louisiana

Any such notice, demand, or request shall be deemed properly given to or served on the Companies if mailed to:

Gulf States Utilities Company
P. O. Box 2431
Baton Rouge, Louisiana 70821

ARTICLE XVI, Section 4 (con't) --

The designation of the persons to be notified, or the addresses of such persons, may be changed by written notice to the other party.

Section 5. Successors and Assigns. This Agreement shall inure to the benefit of and be binding upon the parties hereto and their respective successors and assigns.

ATTEST: CENTRAL LOUISIANA ELECTRIC COMPANY, INC.

_____ By _____
Secretary President

ATTEST: GULF STATES UTILITIES COMPANY

_____ By _____
Secretary President

ATTEST: LOUISIANA POWER & LIGHT COMPANY

_____ By _____
Secretary President

ATTEST: LOUISIANA ELECTRIC COOPERATIVE, INC.

_____ By _____
Secretary President

BLEED THROUGH POOR COPY

EXHIBIT A

POINTS OF DELIVERY

Member Cooperative	La. #	Name	Geographic Location Section	Twp	Rge	Louisiana Parish	Service Characteristics KW	PH	W	KV	Effective Del Month	Day
a) Dixie Electric Membership Corporation	13	--										
b) Pointe Coupee Electric Membership Corporation	15	--										
c) South Louisiana Electric Cooperative Association	8	--										
d) Washington-St Tammany Electric Cooperative, Inc	10	--										

Note: Each delivery point to be listed separately

152

Louisiana Electric Cooperative, Inc	New Roads Steam Electric Plant Substation		(During periods when plant is down for maintenance or other reasons)

R/52

EXHIBIT B

AN ACT

To amend Title 45 of the Louisiana Revised Statutes of 1950 by adding thereto a new section to be designated as R. S. 45:123. 1 relative to stabilizing the service practices of electric public utilities, electric cooperatives and other suppliers of electricity; to regulate the extension and construction of facilities for the furnishing of electric service; and to amend and re-enact Section 426 of Title 12 of the Louisiana Revised Statutes to vest the Louisiana Public Service Commission with authority to adjudicate disputes arising under R. S. 45:123. 1 and to provide the Public Service Commission with additional limited jurisdiction over rates, service practices and operations of electric cooperatives organized under Title 12.

BE IT ENACTED BY THE LEGISLATURE OF LOUISIANA:

Section 1. Section 123. 1 of Title 45 of the Louisiana Revised Statutes of 1950 is hereby enacted to read as follows:

§ 123. 1 STABILIZING SERVICE BY ELECTRIC PUBLIC UTILITIES, ELECTRIC COOPERATIVES AND OTHER SUPPLIERS OF ELECTRICITY: EXTENSION AND CONSTRUCTION OF FACILITIES, REGULATION THEREOF. No electric public utility, electric cooperative or other supplier of electric service shall construct or extend its facilities, or furnish, or offer to furnish electric service, to any point of connection which at the time of the proposed construction, extension, or service is being served by, or which is not being served but is located within three hundred (300') feet

EXHIBIT B, AN ACT (con't) --

of the electric lines of another supplier except with the consent in writing of such other supplier; provided, however, that nothing contained herein shall preclude any supplier of electric service from extending service to unserved premises located within three hundred (300') feet of its existing electric lines although the point of connection be within three hundred (300') feet or less of the existing electric lines of another supplier; and provided further that any consumer who feels aggrieved with the electric service being received by him may apply to the Louisiana Public Service Commission for an order directed to said supplier to show cause why the consumer should not be released from his present supplier, and if the commission shall find that the service rendered to such consumer is inadequate, or that failure to grant said release shall work an undue rdship to the consumer, the release shall be granted provided; however, charges under rates approved by the Public Service Commission may not be considered as constituting a hardship in any case.

As used in this Section, "electric lines" are lines constructed and operated for the transmission and/or distribution of electricity and which, as existing, are adequate to supply the expected power requirements of the customer to be served; provided, however, no line which was originally constructed for the principal purpose of preempting territory shall be considered an "electric line" within the meaning of this Section.

As used in this Section, "supplier" means any person, firm, corporation, or co-erative engaged in the generation, transmission, distribution or sale of electric energy.

EXHIBIT B, AN ACT (con't)

The provisions of this Section shall not apply to municipally-owned or operated utilities of the State of Louisiana or to the Parish of Orleans. Nor shall anything in this Section authorize any supplier of electric service governed thereby to extend service to any customer or consumer within the corporate limits of a municipality from which it does not have a franchise for such service.

Section 2. Section 426 of Title 12 of the Louisiana Revised Statutes of 1950 is hereby amended and re-enacted to read as follows: § 426 JURISDICTION OF THE PUBLIC SERVICE COMMISSION. Cooperatives transacting business in this State pursuant to this part shall be subject to the jurisdiction and control of the Public Service Commission only with respect to their rates, service practices, and operations, and matters arising under the provisions of R. S. 45:123.1.

Section 3. SEVERABILITY

If any provision or item of Section 123.1 of Title 45 of the Louisiana Revised Statutes of 1950 or Section 426 of Title 12 of the Louisiana Revised Statutes of 1950, or the application thereof is held invalid, such invalidity shall not affect other provisions, items or applications of these Sections which can be given effect without the invalid provisions, items or applications and to this end the provisions thereof are thereby declared severable.

Section 4. All laws or parts of laws inconsistent or in conflict herewith be and the same are hereby repealed.

WILLIAM J. WILSON
ATTORNEY AT LAW
SUITE 700
818 EIGHTEENTH STREET, NORTHWEST
WASHINGTON, D. C. 20006

OFFICE OF THE SECRETARY
MAR 26 10 30 AM '69
FEDERAL POWER COMMISSION

March 24, 1969

Honorable Gordon M. Grant, Secretary
Federal Power Commission
441 G Street, N. W.
Washington, D. C. 20426

Dear Mr. Grant:

I represent Jefferson Davis Electric Cooperative, Inc., (Cooperative), P. O. Drawer 1229, Jennings, Louisiana. The cooperative is a rural electric distribution cooperative financed by the Rural Electrification Administration. It purchases its electric power and energy requirements at wholesale from Gulf States Utilities Company, Lake Charles, La.

The purpose of this letter is to request the Commission Staff to call an informal conference to be held at a Commission office and to be attended by Staff members and representatives of the Cooperative and Gulf States Utilities Company (Gulf States) in an attempt to avoid the necessity for the Cooperative filing a formal complaint against Gulf States. Mr. Alvin J. Gerber, Assistant Chief, Division of Rates and Corporate Regulation, is familiar with the problem faced by the Cooperative, the manager of the Cooperative having visited him to discuss the problem some time ago.

The controversy between the Cooperative and Gulf States arises from the fact that Gulf States refuses to make adequate service under reasonable terms available to the Cooperative at a particular delivery point. We shall briefly summarize the pertinent facts.

In 1957, the Cooperative requested an additional power supply metering point from Gulf States at a point approximately 12 miles north of Holly Beach, Cameron Parish, Louisiana, to serve the power requirements of the southwestern portion of the parish. The Cooperative requested 69 KV power supply. Gulf States provided [illegible] 12/13.2 KV distribution metering point (Shellberry metering point) to take care of the 300 KW load which then existed. Gulf States' President, Mr. J. J. Worthen, promised to make available to the Cooperative a 69 KV point of delivery whenever the Cooperative load increased to such a size as to require that transmission voltage. With this assurance, the Cooperative built nine miles of

R157

69 KV transmission line from the new Huckberry metering point for operation at 7.62/13.2 KV for an interim period of time. In addition to the normal area growth certain industrial loads were developed in this isolated area by the Cooperative. By 1967 a 69 KV point of delivery became an absolute must. However, Gulf States has ever since that time absolutely refused to agree to the cooperatives urgent and repeated appeals for a 69 KV point of delivery on any reasonable terms.

Gulf States' representatives have been most candid in admitting that it was exerting every effort to prevent a generation and transmission system being built by Louisiana Electric Cooperative, Inc., of which the Cooperative is a member, and that it would not cooperate in meeting the needs of the Cooperative until the G&T has been killed.

It should be explained that in 1964 Louisiana Electric Cooperative, Inc., the members of which are twelve of the thirteen rural electric distribution cooperatives in Louisiana, received a loan from the Rural Electrification Administration to build a G&T system to serve the power needs of its member cooperatives. Litigation was instituted by Gulf States and the other investor-owned power companies in Louisiana in an attempt to prevent the G&T system from being constructed. Actions were filed against the REA Administrator and the Secretary of Agriculture in the U. S. District Court and actions were filed against the G&T cooperative in the Louisiana courts. The Rural Electrification Administration was successful in the U. S. District Court, but appeals were taken to the U.S. Court of Appeals for the Fifth Circuit, where REA was again successful. The companies then petitioned the U. S. Supreme Court for certiorari which was denied. The state cases were appealed to the Louisiana Supreme Court. All of the cases were decided favorably to the cooperatives.

Although, as stated before, the manager of the Cooperative had discussed this problem with Mr. Garber of the Commission Staff, no immediate action was requested of the Commission at that time because it was hoped an agreement could be worked out with Gulf States after the litigation had been finally disposed of by the U. S. Supreme Court action on the petition for certiorari. However, it now appears clear that Gulf States is not going to furnish adequate service to the cooperatives unless persuaded to do so by the Commission Staff or formally ordered by the Commission to do so. Service has become so bad and the outages so extensive that immediate assistance from the Commission has become critical.

The Cooperative's representatives have met with Gulf States' officials many times and made various offers each time to negotiate an agreement which would not require the company to expend any capital investment unjustifiably. The Cooperative has agreed to sign a contract to run for ten years unless terminated earlier upon three years' written notice. The contract proposed by the Cooperative would provide for a contribution by the Cooperative of approximately $70,000.00 to cover the capital cost of making available the 69 KV point of delivery in the event the Cooperative cancelled the contract before the expiration of the ten-year term. The Cooperative has agreed to sign such a contract covering not only the one delivery point, but all the other delivery points from which it receives from Gulf States the entire power requirements of the Cooperative's system.

Alternatively the Cooperative has proposed a ten-year contract covering only the Hackberry delivery point without any provision for earlier cancellation. Under this proposal the Cooperative would build the required ten miles of 69 KV transmission line from the Hackberry delivery point to Gulf States' present 69 KV termination point located in the community of Hackberry. This proposal would make unnecessary any appreciable capital expenditure by Gulf States.

Gulf States has refused to accept any of the Cooperative's proposals. The only proposal it has made is that the Cooperative pay Gulf States $70,000.00, with the company retaining ownership of the transmission line which would run through the Cooperative's service area. The company insists on ten-year contracts covering all points of delivery with no provision for cancellation prior to the termination of the ten-year period. The Cooperative, of course, cannot enter into such a contract in view of its contractual obligations to Louisiana Electric Cooperative, Inc., the G&T cooperative. On numerous occasions, the Cooperative has agreed to sign a ten-year contract extending for ten years unless terminated earlier on three years' written notice. If so terminated, the Cooperative would pay for any unusual cost incurred by the company in making such service available. Louisiana Power & Light Company has entered into contracts with other cooperatives in the state similar to the one proposed by the Cooperative.

Gulf States is at the present time serving the Cooperative in Louisiana which is not a member of the G&T co-op and is charging them 4¢ more than it is charging the four other cooperatives which are members of the G&T. Gulf States refused to provide the 69 KV delivery service

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has resulted in a crisis for the Cooperative and its consumers. The Hackberry delivery point is now so overloaded that the secondary voltage recorded during the summer peak last year was as low as 100 volts and did not rise above 115 volts on off peak. In order to furnish even the present inadequate service, the Cooperative has been forced to build a step-up 69 KV substation at the Hackberry delivery point and to operate the nine miles of 69 KV line at 69 KV and to put in at the end of such line a step-down 7.62/13.2 KV substation. Regulators have been required to be installed at the metering point and cascaded in the step-down substation and also out on the distribution lines. The Cooperative has expended approximately $100,000.00 in unnecessary capital plant in an attempt to live with this situation. The condition has become so critical at the present time that it cannot be remedied without a 69 KV source at the Hackberry metering point. A black-out in the entire area served from this metering point is threatened for July of this year or sooner.

Last Fall, Louisiana Power & Light Company submitted interim contracts to the cooperatives which satisfactorily met the needs of the cooperatives at an equitable rate. The contracts included three-year cancellation clauses and set forth the rules under which old points of delivery would be uprated and new points of delivery provided. Under the contracts the cooperatives agreed to pay for any unusual capital expense which might be required for the uprating of old delivery points or furnishing new points in the event the cooperative cancelled the contracts before the expiration of a ten-year period.

After the submission of these contracts by Louisiana Power & Light Company, the management of the Cooperative together with the representatives of other Louisiana cooperatives, met with the Vice-Presidents of Gulf States on October 1, 1968. This conference made no progress in reaching a solution of the interim power supply problem.

On January 22 of this year, the manager of the Cooperative met with Lionel Dugas, a Vice-President of Gulf States. As a result of this meeting, the manager thought that the problem had been satisfactorily solved. However, in a telephone conversation initiated by the manager of the Cooperative sometime later, Mr. Dugas stated that Gulf States would do nothing other than insist upon a ten-year contract covering all delivery points. He indicated that the company was still exerting every effort to prevent the SMEPA from being built and, therefore, could not offer any assistance whatsoever to meet the needs of the Cooperative until the SMEPA had been killed. In a subsequent discussion with Mr. Dugas, he agreed that service at the Hackberry delivery point needed attention.

R160

The outage situation has been intolerable for more than a year. There is attached hereto a letter from Mobile Oil Corporation showing the interruptions to service to that corporation occurring from December 11, 1967, through July 10, 1968. Complaints have been received from many other consumers of the Cooperative. There is also attached a list of the outages on the Holly Beach line from December, 1967, to July, 1968.

As indicated above, it would now appear that a black-out in the entire area served from this delivery point will occur in July of this year, if not sooner.

In an attempt to save the expense involved in the filing of a formal complaint and in the participation in a hearing, we respectfully urge the Staff to arrange for a meeting in the office of the Staff at the earliest possible date, to be attended by representatives of Gulf States and the Cooperative, at which an attempt could be made to solve this threat to the continuity of adequate service to the area involved by mutual agreement. The Cooperative will be most grateful if such a meeting is held. If the Staff is unable to work out an agreement between the parties, the Cooperative will then, of course, be forced to file a formal complaint.

Sincerely,

Wm. C. Wise

William C. Wise

WCW:dm
Encls.

As filed with the Securities and Exchange Commission on November 4, 1970

Registration No. 2-38740 Amendment No. 1

Exhibit N (F-PC)

R 215

SECURITIES AND EXCHANGE COMMISSION

Washington, D. C. 20549

FORM S-9

REGISTRATION STATEMENT

Under

THE SECURITIES ACT OF 1933

Gulf States Utilities Company

(Exact name of registrant as specified in charter)

P. O. BOX 2951, BEAUMONT, TEXAS 77704

(Address of principal executive offices)

F. R. SMITH, *President*

Gulf States Utilities Company

P. O. Box 2951

Beaumont, Texas 77704

J. M. STOKES, *Vice President—Finance and Secretary*

Gulf States Utilities Company

P. O. Box 2951

Beaumont, Texas 77704

(Names and addresses of agents for service)

Approximate date of Invitation for Bids for the purchase of New Bonds—November 24, 1970.
Approximate date of proposed public offering—December 9, 1970.

CALCULATION OF REGISTRATION FEE

Title of Each Class of Securities Being Registered	Amount Being Registered	Proposed Maximum Offering Price Per Unit	Proposed Maximum Aggregate Offering Price	Amount of Registration Fee
First Mortgage Bonds, % Series A due 2000	$30,000,000	104%*	$31,200,000*	$6,240

* This amount has been inserted solely for the purpose of calculating the filing fee.

R218

USE OF PROCEEDS

The net proceeds to be received by Gulf States Utilities Company (the "Company") from the sale of the Bonds offered hereby (the "New Bonds"), after deduction of expenses and exclusive of accrued interest, will be used by the Company to pay off part of its short-term notes having various maturity dates extending into 1971, of which it is estimated $55,000,000 will be outstanding at the time of the sale of the New Bonds. The proceeds from the notes being paid were used in connection with the Company's construction program and for other corporate purposes.

All of the short-term notes expected to be outstanding will either be in the form of commercial paper, or short-term notes issued under the Company's revolving credit agreements with banks which provide for loans maturing on December 31, 1970, up to an aggregate of $27,330,000. Upon prepayment of any note or part thereof issued under the credit agreements, the full amount of such payment shall be immediately restored to the aggregate principal amount of the credit available under such agreements. On or before December 31, 1970, the Company expects to consummate new similar revolving credit agreements with banks providing for loans maturing on December 31, 1971, up to an aggregate of $40,000,000.

CONSTRUCTION PROGRAM

On September 10, 1970, the Company's system load reached a peak of 3,039,400 kilowatts and at that time the Company's generating capability and firm power contracts provided a reserve of approximately 21%. The 1970 peak represents a 66% increase over that of 1965. To meet anticipated growth in system load, the Company has scheduled in the five-year period 1970 through 1974, the installation of four 580,000 kilowatt units and two 265,000 kilowatt units. The cost of new construction in 1970 is expected to be $110,000,000 and the cost of new construction in 1971 is expected to be approximately $93,000,000.

The 1970-71 program consists of the following principal items:

Additional electric and steam production plant	$ 92,760,000
Additional electric transmission and distribution facilities	105,370,000
Other additional electric improvements	3,190,000
Additional gas plant	1,680,000
Total	$203,000,000

It is anticipated that the Company will, in addition to the funds obtained from this offering and funds internally generated, require prior to the end of 1971, approximately $66 million from outside sources. It is contemplated that some portion of this amount will take the form of permanent financing, the nature, time and extent of which has not yet been determined.

Total gross additions to the plant account of the Company during the period January 1, 1965 through August 31, 1970, amounted to $509,598,939, and during the same period retirements from the plant account amounted to $36,167,677. Gross additions during the period amounted to approximately 57% of total net plant at August 31, 1970.

HISTORY AND BUSINESS

The Company was incorporated August 25, 1925, under the laws of the State of Texas and is engaged principally in the business of generating, transmitting, distributing and selling at retail electric energy in a 28,000 square mile area in southeastern Texas and in south central Louisiana, extending a distance of over 350 miles along the Texas-Louisiana Coast. The Company's electric system is interconnected, and interconnections with other utilities are maintained for the exchange of power. The Company also conducts a steam products business and sells natural gas in the Baton Rouge, Louisiana area.

For the 12-month period ended August 31, 1970, 90% of the Company's operating revenues were derived from the electric utility business, 7% from the steam products business and 3% from the gas business. Of the electric operating revenues, 55% were derived from within Louisiana and 45% from within Texas. The gas and steam products businesses are conducted entirely in Louisiana.

The Company and ten other investor-owned electric utility companies comprising the South Central Electric Companies have an agreement with The Tennessee Valley Authority (TVA) to interchange 1,500,000 kilowatts of electric power. The Company's share of the exchange is 215,000 kilowatts. The companies have constructed a 500,000 volt electric transmission network linking their electric systems in Louisiana, Texas, Arkansas, Oklahoma, Mississippi, Missouri and Kansas. The Company is extending the 500,000 volt transmission line into its own service area to help assure future reliability of service.

The Company and two other operating utility companies have an agreement with the Sabine River Authorities of Louisiana and Texas under which the Company is to purchase 50% of the electric output of the Toledo Bend Hydroelectric plant. The Company has a commitment to pay approximately $1,000,000 annually through May 1, 2004, and approximately $800,000 annually thereafter for 14 years.

The electric business is substantially free from direct competition with municipalities or with other investor-owned electric utilities. There are 19 rural electric cooperatives, sponsored by the Rural Electrification Administration, operating within or adjacent to the service area of the Company. These cooperatives purchase their entire power supply from the Company or from adjacent systems. The operation and extension of these cooperatives in certain areas tend to restrict expansion of the Company's system in such areas. However, the Company is continuing to extend its service into rural areas.

In September, 1964, the Rural Electrification Administration approved a loan of $56,521,000 to Louisiana Electric Cooperative, Inc., a super-cooperative formed by 12 of the 13 REA cooperatives in Louisiana, for the proposed construction of a 200,000 kilowatt generating plant and approximately 1,800 miles of transmission lines in Louisiana, some of which would duplicate transmission facilities of the Company. Construction of the generating plant is proceeding. The Company and two other Louisiana electric utility companies which also serve the cooperatives are presently negotiating with Louisiana Electric Cooperative, Inc., its members and the Rural Electrification Administration to use such utility companies' facilities to wheel the power generated by the 200,000 kilowatt generating plant to certain of the distributive cooperatives, thereby making it unnecessary for the super-cooperative to construct duplicate transmission lines.

Four of the twelve rural electric cooperatives which organized the Louisiana Electric Cooperative, Inc., presently take part or all of their electric supply from the Company. During the 12 months ended August 31, 1970, the Company sold to these four cooperatives 300,493,013 kilowatt-hours, or 2% of total sales to electric customers, for a total revenue of $1,954,603, or 1% of total revenue from electric customers.

In Baton Rouge, Louisiana, the Company operates a specially designed steam-electric extraction plant which has been furnishing process steam and by-product electric energy to Ethyl Corporation and Humble Oil & Refining Company since the 1930's and to Uniroyal since 1950. The Humble Oil & Refining Company agreement runs to January 1, 1978, and continues after the initial term until cancelled by three years' written notice. The contracts with Uniroyal and with the Ethyl Corporation are presently cancellable on three years' written notice. The Company constructed and owns a specially designed steam-electric extraction plant in Baton Rouge which furnishes the requirements of the Industrial Chemicals Division of Allied Chemical Corporation for process steam and electricity. It is being operated and maintained by Allied under a twenty-year contract, which runs to February 1, 1989, and under which Allied makes annual payments to the Company, including amounts sufficient to amortize the cost of such plant over the term of the contract.

Boiler gas for the Company's various generating plants is provided for under long-term contracts with Humble Oil & Refining Company and Texas Intrastate Gas Company in Texas and with Monterey Pipeline Company and United Gas Pipe Line Company in Louisiana. These contracts run until 1985, 1985, 1981, and 1987, respectively. The contract with United Gas Pipe Line Company contains

provisions for price re-determination in 1977 and 1982. Part of the gas to be supplied by United Gas has been and may be supplied by Texaco, Inc., at Texaco's election. United Gas Pipe Line Company has informed the Company that commencing in November, 1970, its deliveries to the Company's Roy S. Nelson and Willow Glen Stations in Louisiana will be limited to amounts which are less than the Company presently estimates would otherwise be used by such plants. However the Company does not expect this to result in any reduction in or interruption of service to its customers, since the Company believes it has adequate alternate sources of power or alternate supplies of fuel to meet its operating requirements. These alternatives would increase the Company's cost of power in varying degrees, but the Company does not anticipate that any such increase would materially affect the net earnings of the Company.

The Company distributes natural gas purchased from Mid Louisiana Gas Company (formerly known as Humble Gas Transmission Company) and Monterey Pipeline Company in Baton Rouge and its environs which have an estimated population of 210,000. The contract with Mid Louisiana, the principal source of purchased gas, expires January 1, 1971, and negotiations for a new contract are now in progress. The Louisiana Public Service Commission recently granted the Company a 9.42% increase in the rates for the sale of gas so distributed.

The Company has a contract with the International Brotherhood of Electrical Workers which is the collective bargaining representative of employees formerly represented by the Independent Electrical Workers Union. A strike, which became system-wide April 24, 1970, was ended on July 5, 1970 with the ratification of the contract. The contract runs until July 8, 1972 and contains provisions, among others, for an immediate 7% wage increase, a wage increase on January 3, 1971 (5½%), and on October 3, 1971 (5%).

REGULATION

The rates of the Company in Texas are subject to the jurisdiction of municipal authorities, and as to all rates, including those in unincorporated towns and rural areas, the District Court has authority to declare unlawful an extortionate or unreasonable rate. Texas does not have a state utility regulatory body with jurisdiction over the rates or issuance of securities of the Company.

In Louisiana (in which state the Company is duly qualified to carry on business as a foreign corporation), a statute provides that the Louisiana Public Service Commission shall have jurisdiction over the rates and services of public utility companies. There is some question, in view of certain provisions in the Louisiana Constitution giving such jurisdiction to some municipalities, as to whether the aforesaid statute is constitutional as applied to such municipalities. In the opinion of the Company's counsel neither the Louisiana Public Service Commission nor any other governmental authority in the State of Louisiana has any jurisdiction over the issuance of securities by the Company.

In certain of its activities, including the issuance and sale of the securities covered by this Prospectus, the Company is subject to the jurisdiction of the Federal Power Commission.

The Company is not subject to the Public Utility Holding Company Act of 1935.

The Company may be subject to regulation by various federal, state and local environmental control authorities.

R 263

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL POWER COMMISSION

In the Matter of:	)	Docket No.:
	)	
GULF STATES UTILITIES COMPANY	)	E-7567

ANSWER OF
GULF STATES UTILITIES COMPANY
TO PROTEST AND PETITION TO INTERVENE

I.

The application of Gulf States Utilities Company (Applicant) in the above captioned docket was filed on October 12, 1970, and due notice of such application was published on October 16, 1970, requiring that any protests or petitions be filed on or before November 2, 1970.

II.

Applicant has been served with a document styled as a Protest and Petition to Intervene, on behalf of the Cities of Lafayette and Plaquemine, Louisiana (Petitioners), protesting Applicant's application, petitioning to intervene, and requesting a formal hearing.

III.

The names, titles and addresses of the persons to whom communications from the Commission in regard to the

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filing are to be addressed are:

B. D. Orgain, Esquire
Benny H. Hughes, Jr., Esquire
Orgain, Bell & Tucker
Fourth Floor, Beaumont
Savings Building
Beaumont, Texas 77701

F. R. Smith, President and
Principal Executive Officer
Gulf States Utilities Company
P. O. Box 2951
Beaumont, Texas 77704

John E. Holtzinger, Jr., Esquire
John C. Mason, Esquire
Morgan, Lewis & Bockius
Suite 1100
1140 Connecticut Avenue, N. W.
Washington, D. C. 20036

IV.

Applicant alleges that Petitioners have no standing to intervene under Section 308(a) of the Federal Power Act or Section 1.8(b) of the Commission's Rules of Practice and Procedure, in that they have not alleged any interest which may directly be affected, or as to which they will be bound, by action on Applicant's application for authorization of issuance of bonds, or which may be affected by the issuance of the bonds proposed. Further, Petitioners have not otherwise shown that their participation may be in the public interest.

Commission approval of the security application without deciding the merits of Petitioner's antitrust

allegations would not require Petitioners to do or refrain from doing anything, nor would it fix any liability upon Petitioners, or finally determine their rights or obligations which may be pursued under other provisions of the Act or in other legal proceedings. Therefore, Petitioners have no right or interest which could be affected in this proceeding, nor could Petitioners be aggrieved within the meaning of Section 313 of the Federal Power Act by any action of the Commission in this proceeding.

For these reasons, Applicant requests that Petitioners' petition to intervene be denied.

V.

The purpose of Section 204 of the Federal Power Act is to prevent unsound financing which might impair the financial integrity of public utilities. This Commission, addressing itself to the scope of Section 204 and examining in detail the legislative history of that section in Pacific Power & Light Co., 27 FPC 623 (1962) concluded at p. 626:

> The plain purpose of Section 204 is to prevent the issuance of securities which might impair the company's financial integrity or its ability to perform

> its public utility responsibilities. The Senate Committee report on the bill which included the present Section 204 stressed that "control over capitalization of operating utilities is plainly an essential means of safeguarding the public against unsound financial practices which make impossible the proper and most economic performance of public utility functions. [Footnote omitted.]

The Commission correctly observed in the Pacific case that its "procedures for considering security issues must be expeditious if, in view of changing marketing conditions, utilities are to be able to raise the money needed to carry out their responsibilities." 27 F.P.C. at 629. The Commission also held that its jurisdiction to authorize issuance of securities did not constitute certificating authority[1/] and that, therefore, a hearing to consider the

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1/ Petitioners erroneously rely on Northern Natural Gas Company v. FPC, 399 F.2d 953 (D.C. Cir. 1968). That case arose under Section 7 of the Natural Gas Act, which requires the Commission to exercise certificate authority, and to hold a hearing. Section 204 of the Federal Power Act provides only an opportunity for hearing and does not involve certificate authority.

Petitioners likewise erroneously cite Municipal Elec. Ass'n. of Mass. v. SEC, 413 F.2d 1052 (1969). That case turns on the specific language of Section 10(b)(1) of the Public Utility Holding Company Act, which has no counterpart in Section 204 of the Federal Power Act.

detailed merits of the facilities for which financing was sought was inappropriate. 2/

Hence it is well established that proceedings under Section 204 of the Federal Power Act are limited in scope to consideration of the public interest in issuance of securities and do not require consideration of the public interest associated with the construction, operation or maintenance of facilities involved in such financing. It follows that Petitioners' request for a hearing to consider their allegations of activities in violation of the anti-trust laws which are not even linked to the refinancing involved here is wholly inappropriate.

Furthermore if the Commission were to give consideration in this proceeding to matters unrelated to the application to issue securities, the investigation would be unbounded and interminable. In this specific instance, if

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2/ The Commission would be fully justified in acting on this security application, without hearing, because the Petition to Intervene is, in substance, a brief and written argument. Citizens for Allegan County, Inc. v. FPC, 414 F.2d 1125 (1969). Here, as there, Petitioners have put together a number of objections that have a theoretical predicate but are of no substantial moment in the particular case. (See p. 1134). See also, Pacific Gas and Electric Co., Project No. 2687, Order issued November 6, 1970.

the Commission were to consider Petitioners' allegations, it might well also include consideration of the activities of the Petitioners and any possible violation of antitrust laws that might be involved in their actions and agreements. Such expansion of the scope of the proceeding beyond the statutory limits of Section 204 not only would burden the procedures of the Commission with matters irrelevant to financing applications, but also would seriously jeopardize successful utility financing which is extremely sensitive to proper timing. The financial planning of public utilities with regard to issuance of securities would become highly speculative, resulting in inevitable impairment of their financial integrity and ability to perform their public utility responsibilities. In short, the expansion of the scope of the proceeding under Section 204 that Petitioners here seek would lead to a result in direct contravention of the primary Congressional intent underlying the enactment of that section. Furthermore, nothing would be more adverse to the construction of urgently needed power facilities than the delay in financing that would inevitably result from the broad expansion of Section 204 proceedings sought by Petitioners herein.

In fact Petitioners' own pleading shows that their request goes beyond the statutory scope of a Section 204 proceeding. Petitioners allege that the activities which form the basis of their protest are described in a statement of the National Rural Electric Cooperative Association that is attached as Appendix A to Petitioners' pleading. Counsel for NRECA, in the conclusion of that statement,[3/] specifically recognized the limited scope of proceedings under Section 204 of the Act and, therefore, requested a statutory revision of that Section to permit consideration of the type of allegations which Petitioners raise herein.

The purpose for which the securities here involved are to be issued, set forth in Item J of the application filed October 12, 1970, is to pay off outstanding commercial paper and short-term notes to banks heretofore incurred pursuant to Commission authorization in Docket No. E-7509. The Commission has, therefore, already determined that the funds involved in the instant case are for a lawful object within the corporate purposes. The

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3/ Appendix A, pp. 11-12.

short-term notes previously authorized are expected to be approximately $55 million in principal amount at the time of the proposed sale in December 1970, at least $30 million of which are due and payable on or before December 31, 1970. Issuance of long-term securities to enable the Applicant to pay off its current short-term indebtedness is essential to maintain the financial integrity of Applicant and thereby enable Applicant to continue its service as a public utility. Nothing in the Protest and Petition to Intervene disputes the purpose for which Applicant will issue its securities, challenges the prior approval of short-term financing by the Commission, or the soundness of Applicant's financing program to replace such short-term financing with long-term securities. If the hearing sought by Petitioners were granted, <u>any</u> financing by the Applicant, for whatever purpose, could be delayed indefinitely.

Applicant had a construction budget for the year 1970 of approximately $110 million, and its 1971 construction budget is approximately $93 million. Such enormous funds can only be generated by the issuance of securities in accordance with scheduled financial planning. Financing

and construction by utilities could be paralyzed if, in such a case as this, the Commission should halt financing and the utility company's ability to pay for its construction pending an examination of the broad range of questions presented in the Protest and Petition to Intervene.

Even if all of the allegations of Petitioners, asserting improper or unlawful activities of Applicant, were accepted as true by the Commission, Applicant urges that such matters are irrelevant to this application and that the public purpose of maintaining the financial integrity of Applicant by authorization of the issuance of bonds to permit repayment of authorized short-term indebtedness overrides the matters raised by Petitioners and supports findings by the Commission of the statutory criteria for authorization of the bonds under Section 204.

VI.

Applicant denies each and every allegation by Petitioners that it has either alone or in concert with any other person or entity violated any provision of the anti-trust laws, the Federal Power Act, or the Public Utility Holding Company Act of 1935; that the issuance of the bonds

is for an unlawful object, incompatible with the public interest and is neither necessary nor appropriate for, nor consistent with the proper performance by the Applicant of service as a public utility. Applicant denies that it has combined or conspired in restraint of trade, or has combined or conspired to expand or obtain monopolies, to obtain captive markets, or to destroy any advantageous pool agreement of the Petitioners and Dow Chemical Company and Louisiana Electric Cooperative, Inc.. Applicant denies that its construction of transmission and generating facilities has been, or is, for unlawful objectives.

For reasons stated in this Answer, Applicant respectfully requests that the Commission deny the Petition to Intervene and, without hearing, issue its order approving Applicant's application for issuance of securities. Applicant respectfully requests that the Commission act

on the application in such manner as to enable the Applicant to proceed with its financing schedule.

Respectfully submitted,

GULF STATES UTILITIES COMPANY

By _____
John E. Holtzinger, Jr.
Counsel

MORGAN, LEWIS & BOCKIUS
1140 Connecticut Avenue, N.W.
Washington, D.C. 20036
Of Counsel

November 12, 1970

R 274

AFFIDAVIT

CITY OF WASHINGTON)
) SS:
DISTRICT OF COLUMBIA)

The undersigned, JOHN E. HOLTZINGER, JR., having been duly sworn, deposes and says that he is Counsel for Gulf States Utilities Company; that he has executed the foregoing Answer for and on behalf of said Company; that he is familiar with said Answer and the contents thereof; and that to the best of his knowledge, information and belief, the facts set forth in said Answer are true.

John E. Holtzinger, Jr.

Sworn to and subscribed before me this 12th day of November, 1970.

Jacqueline S. Jaffe
Notary Public
[My Comm. Exp. 3/31/74]

[SEAL]

EXHIBIT II-1 (FPC)

As filed with the Securities and Exchange Commission on November 20, 1970 Amendment No. 2

Registration No. 2-38740

R 277

SECURITIES AND EXCHANGE COMMISSION

Washington, D. C. 20549

AMENDMENT NO. 1

To

FORM S-9

REGISTRATION STATEMENT

Under

THE SECURITIES ACT OF 1933

Gulf States Utilities Company

(Exact name of registrant as specified in charter)

P. O. BOX 2951, BEAUMONT, TEXAS 77704
(Address of principal executive offices)

F. R. SMITH, *President*
Gulf States Utilities Company
P. O. Box 2951
Beaumont, Texas 77704

J. M. STOKES, *Vice President—Finance and Secretary*
Gulf States Utilities Company
P. O. Box 2951
Beaumont, Texas 77704
(Names and addresses of agents for service)

R 180

USE OF PROCEEDS

The net proceeds to be received by Gulf States Utilities Company (the "Company") from the sale of the Bonds offered hereby (the "New Bonds"), after deduction of expenses and exclusive of accrued interest, will be used by the Company to pay off part of its short-term notes having various maturity dates extending into 1971, of which it is estimated $55,000,000 will be outstanding at the time of the sale of the New Bonds. The proceeds from the notes being paid were used in connection with the Company's construction program and for other corporate purposes.

All of the short-term notes expected to be outstanding will either be in the form of commercial paper, or short-term notes issued under the Company's revolving credit agreements with banks which provide for loans maturing on December 31, 1970, up to an aggregate of $27,330,000. Upon prepayment of any note or part thereof issued under the credit agreements, the full amount of such payment shall be immediately restored to the aggregate principal amount of the credit available under such agreements. On or before December 31, 1970, the Company expects to consummate new similar revolving credit agreements with banks providing for loans maturing on December 31, 1971, up to an aggregate of $40,000,000.

CONSTRUCTION PROGRAM

On September 10, 1970, the Company's system load reached a peak of 3,039,400 kilowatts and at that time the Company's generating capability and firm power contracts provided a reserve of approximately 21%. The 1970 peak represents a 66% increase over that of 1965. To meet anticipated growth in system load, the Company has scheduled in the five-year period 1970 through 1974, the installation of four 580,000 kilowatt units and two 265,000 kilowatt units. The cost of new construction in 1970 is expected to be $110,000,000 and the cost of new construction in 1971 is expected to be approximately $93,000,000.

The 1970-71 program consists of the following principal items:

Additional electric and steam production plant	$ 92,760,000
Additional electric transmission and distribution facilities	105,370,000
Other additional electric improvements	3,190,000
Additional gas plant	1,680,000
Total	$203,000,000

It is anticipated that the Company will, in addition to the funds obtained from this offering and funds internally generated, require prior to the end of 1971, approximately $66 million from outside sources. It is contemplated that some portion of this amount will take the form of permanent financing, the nature, time and extent of which has not yet been determined.

Total gross additions to the plant account of the Company during the period January 1, 1965 through August 31, 1970, amounted to $509,598,939, and during the same period retirements from the plant account amounted to $36,167,677. Gross additions during the period amounted to approximately 57% of total net plant at August 31, 1970.

HISTORY AND BUSINESS

The Company was incorporated August 25, 1925, under the laws of the State of Texas and is engaged principally in the business of generating, transmitting, distributing and selling at retail electric energy in a 28,000 square mile area in southeastern Texas and in south central Louisiana, extending a distance of over 350 miles along the Texas-Louisiana Coast. The Company's electric system is interconnected, and interconnections with other utilities are maintained for the exchange of power. The Company also conducts a steam products business and sells natural gas in the Baton Rouge, Louisiana area.

For the 12-month period ended August 31, 1970, 90% of the Company's operating revenues were derived from the electric utility business, 7% from the steam products business and 3% from the gas business. Of the electric operating revenues, 55% were derived from within Louisiana and 45% from within Texas. The gas and steam products businesses are conducted entirely in Louisiana.

R 281

The Company and ten other investor-owned electric utility companies comprising the South Central Electric Companies have an agreement with The Tennessee Valley Authority (TVA) to interchange 1,500,000 kilowatts of electric power. The Company's share of the exchange is 215,000 kilowatts. The companies have constructed a 500,000 volt electric transmission network linking their electric systems in Louisiana, Texas, Arkansas, Oklahoma, Mississippi, Missouri and Kansas. The Company is extending the 500,000 volt transmission line into its own service area to help assure future reliability of service.

The Company and two other operating utility companies have an agreement with the Sabine River Authorities of Louisiana and Texas under which the Company is to purchase 50% of the electric output of the Toledo Bend Hydroelectric plant. The Company has a commitment to pay approximately $1,000,000 annually through May 1, 2004, and approximately $800,000 annually thereafter for 14 years.

The electric business is substantially free from direct competition with municipalities or with other investor-owned electric utilities. There are 19 rural electric cooperatives, sponsored by the Rural Electrification Administration, operating within or adjacent to the service area of the Company. These cooperatives purchase their entire power supply from the Company or from adjacent systems. The operation and extension of these cooperatives in certain areas tend to restrict expansion of the Company's system in such areas. However, the Company is continuing to extend its service into rural areas.

In September, 1964, the Rural Electrification Administration approved a loan of $56,521,000 to Louisiana Electric Cooperative, Inc., a super-cooperative formed by 12 of the 13 REA cooperatives in Louisiana, for the proposed construction of a 200,000 kilowatt generating plant and approximately 1,800 miles of transmission lines in Louisiana, some of which would duplicate transmission facilities of the Company. Construction of the generating plant is proceeding. The Company and two other Louisiana electric utility companies which also serve the cooperatives are presently negotiating with Louisiana Electric Cooperative, Inc., its members and the Rural Electrification Administration to use such utility companies' facilities to wheel the power generated by the 200,000 kilowatt generating plant to certain of the distributive cooperatives, thereby making it unnecessary for the super-cooperative to construct duplicate transmission lines.

Four of the twelve rural electric cooperatives which organized the Louisiana Electric Cooperative, Inc., presently take part or all of their electric supply from the Company. During the 12 months ended August 31, 1970, the Company sold to these four cooperatives 300,493,013 kilowatt-hours, or 2% of total sales to electric customers, for a total revenue of $1,954,603, or 1% of total revenue from electric customers.

In Baton Rouge, Louisiana, the Company operates a specially designed steam-electric extraction plant which has been furnishing process steam and by-product electric energy to Ethyl Corporation and Humble Oil & Refining Company since the 1930's and to Uniroyal since 1950. The Humble Oil & Refining Company agreement runs to January 1, 1978, and continues after the initial term until cancelled by three years' written notice. The contracts with Uniroyal and with the Ethyl Corporation are presently cancellable on three years' written notice. The Company constructed and owns a specially designed steam-electric extraction plant in Baton Rouge which furnishes the requirements of the Industrial Chemicals Division of Allied Chemical Corporation for process steam and electricity. It is being operated and maintained by Allied under a twenty-year contract, which runs to February 1, 1989, and under which Allied makes annual payments to the Company, including amounts sufficient to amortize the cost of such plant over the term of the contract.

Boiler gas for the Company's various generating plants is provided for under long-term contracts with Humble Oil & Refining Company and Texas Intrastate Gas Company in Texas and with Monterey Pipeline Company and United Gas Pipe Line Company in Louisiana. These contracts run until 1985, 1985, 1981, and 1987, respectively. The contract with United Gas Pipe Line Company contains provisions for price re-determination in 1977 and 1982. Part of the gas to be supplied by United Gas has been and may be supplied by Texaco, Inc. under a separate agreement. United Gas Pipe Line Company has informed the Company that commencing in November, 1970, its deliveries to the Company's Roy S. Nelson and Willow Glen Stations in Louisiana will be limited to amounts which are less than the

Company presently estimates would otherwise be used by such plants. However the Company does not expect this to result in any reduction in or interruption of service to its customers, since the Company believes it has adequate alternate sources of power or alternate supplies of fuel to meet its operating requirements. These alternatives would increase the Company's cost of power in varying degrees, but the Company does not anticipate that any such increase would materially affect the net earnings of the Company.

The Company distributes natural gas purchased under an agreement with Mid Louisiana Gas Company (which agreement is subject to approval by regulatory bodies having jurisdiction) in Baton Rouge and its environs which have an estimated population of 210,000. The contract with Mid Louisiana expires December 31, 1975. The Louisiana Public Service Commission recently granted the Company a 9.42% increase in the rates for the sale of gas so distributed.

The Company has a contract with the International Brotherhood of Electrical Workers which is the collective bargaining representative of employees formerly represented by the Independent Electrical Workers Union. A strike, which became system-wide April 24, 1970, was ended on July 5, 1970 with the ratification of the contract. The contract runs until July 8, 1972 and contains provisions, among others, for an immediate 7% wage increase, a wage increase on January 3, 1971 (5½%), and on October 3, 1971 (5%).

REGULATION

The rates of the Company in Texas are subject to the jurisdiction of municipal authorities, and as to all rates, including those in unincorporated towns and rural areas, the District Court has authority to declare unlawful an extortionate or unreasonable rate. Texas does not have a state utility regulatory body with jurisdiction over the rates or issuance of securities of the Company.

In Louisiana (in which state the Company is duly qualified to carry on business as a foreign corporation), a statute provides that the Louisiana Public Service Commission shall have jurisdiction over the rates and services of public utility companies. There is some question, in view of certain provisions in the Louisiana Constitution giving such jurisdiction to some municipalities, as to whether the aforesaid statute is constitutional as applied to such municipalities. In the opinion of the Company's counsel neither the Louisiana Public Service Commission nor any other governmental authority in the State of Louisiana has any jurisdiction over the issuance of securities by the Company.

In certain of its activities, including the issuance and sale of the securities covered by this Prospectus, the Company is subject to the jurisdiction of the Federal Power Commission. On November 2, 1970 the Cities of Lafayette and Plaquemine, Louisiana, filed a Protest and Petition to Intervene in the proceeding initiated by the Company before the Federal Power Commission (FPC) for authorization to issue the New Bonds, alleging that the Company, together with Louisiana Power and Light Company and Central Louisiana Electric Company, Inc., may be engaging in actions violative of the anti-trust laws, the Federal Power Act, and the Public Utility Holding Company Act to their detriment. In their Protest and Petition to Intervene the Cities opposed the authorization of the issue of the New Bonds unless and until the Company purged itself of the alleged violations or unless the FPC conditioned its authorization upon cessation of the alleged unlawful actions and the establishment of a program to rectify the damage alleged to be suffered by the Cities, and requested a hearing. The FPC has not acted on the Company's application for issuance of the New Bonds or on the Protest and Petition to Intervene. The New Bonds may not be issued by the Company unless such issue has been authorized by the FPC.

The Company is not subject to the Public Utility Holding Company Act of 1935.

The Company may be subject to regulation by various federal, state and local environmental control authorities.

R 300

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: John N. Nassikas, Chairman;
Lawrence J. O'Connor, Jr., Carl E. Bagge,
John A. Carver, Jr., and Albert B. Brooke, Jr.

Gulf States Utilities Company) Docket No. E-7567

ORDER AUTHORIZING ISSUANCE OF FIRST MORTGAGE
BONDS, GRANTING INTERVENTION AND DENYING HEARING

(Issued December 3, 1970)

Gulf States Utilities Company (Applicant), a corporation organized under the laws of the State of Texas and doing business in the States of Texas and Louisiana, filed an application on October 12, 1970, seeking an order pursuant to Section 204 of the Federal Power Act authorizing it to issue and sell at competitive bidding, $30,000,000 aggregate principal amount of First Mortgage Bonds, due 2000.

The Applicant proposes to issue the Bonds under their Indenture of Mortgage to Manufacturers Hanover Trust Company, dated September 1, 1926, as supplemented and proposed to be further supplemented by a Twenty-ninth Supplemental Indenture dated as of the date of the new Bonds.

Applicant originally proposed to publish bids for purchase of the Bonds on November 24, 1970, and to accept a bid on December 9, 1970. The proposed publication of bids can be delayed for one-week and still allow the Applicant to meet the date set for bid acceptance.

Each bid must be presented by a single bidder or by a group of bidders to the Company at Manufacturers Hanover Trust Company, the Federal Room, Fourth Floor, 40 Wall Street, New York, New York 10015, before 11:00 A.M. New York Time, on December 9, 1970.

Each bid shall specify, among other things, (1) the interest rate of the Bonds, which shall be a multiple of 1/8%; (2) the price (expressed as a percentage of the principle amount), exclusive of accrued interest, to be paid to the

DC-25

Company for the Bonds, which shall not be less than 99% and not more than 102½% of the principle amount of the Bonds, and that accrued interest on the Bonds from the first day of the month in which the Bonds are issued to the date of payment therefor and delivery thereof will be paid to the Company by the Purchaser or Purchasers.

The proceeds to be realized from the sale and issuance of the proposed Bonds will be used by the Company to refund and pay off part of its commercial paper and short-term notes to banks to be outstanding as of the date of issuance. The Company estimates that on December 16, 1970, the date the securities are expected to be sold, there will be outstanding approximately $55 million principal amount of commercial paper and short-term notes issued on various dates. The short-term indebtedness of the Company was authorized by the Commission in Docket No. E-7509 and the proceeds from the notes were expended in connection with the Company's construction program and for other corporate purposes. The cost of new construction is expected to total $110 million in 1970 and $93 million in 1971.

Written notice of the application has been given to the Texas Railroad Commission, the Louisiana Public Service Commission, and to the Governor of each of those States. Notice has also been given by publication in the Federal Register on October 27, 1970 (35 F.R. 16649), stating that any person desiring to be heard or to make any protest with reference to the application should on or before November 2, 1970, file a petition or protest with the Federal Power Commission, Washington, D. C. 20426.

On November 2, 1970, the Cities of Lafayette and Plaquemine, Louisiana, filed a protest and petition to intervene in the proceeding requesting that the Commission withhold the order authorizing the issuance of the proposed Bonds and that the proceeding be set for hearing. Intervenors allege that activities of the applicant violate Federal anti-trust laws, Section 10(h) of the Federal Power Act, and the Public Utility Holding Company Act of 1935. All violations arising from Applicant's activities allegedly prevented construction of generating facilities by certain utilities in Louisiana and power pooling arrangements in which the cities are to participate.

On November 12, 1970, the Applicant answered the protest and petition to intervene denying violations of the anti-trust laws, the Federal Power Act, or the Public Utility Holding Company Act of 1935, and contending, among other things that the Cities lack standing to intervene, in that they have not alleged any interest which may be affected, or as to which they will be bound by Commission authorization of the proposed Bond application.

The requested approval of the issuance of the Bonds allow the Company only to change the form of a portion of its outstanding indebtedness, it does not call for the initiation of any construction or other program by the Company which might effect the interest of the Petitioners. The alleged violations which petitioners attempt to raise in this proceeding are irrelevant to a requested authorization of securities. There is no relief that the Commission can order in authorizing the issuance of the Bonds for refinancing purposes that would have any effect on the interest of the Petitioners, or solve any of the problems outlined by them.

The Commission finds:

(1) The Applicant, a corporation, is a public utility within the meaning of Section 204 of the Federal Power Act subject to the jurisdiction of the Commission as heretofore determined and set forth in the Commission's order issued November 27, 1957, In the Matter of Gulf States Utilities Company, Docket No. E-6785 (18 FPC 701).

(2) The proposed issuance and sale of Bonds, as described above will constitute an issuance of securities within the purview of Section 204 of the Act.

(3) Applicant is not organized and operating in a State under the laws of which the security issue here involved is regulated by a State Commission within the meaning of Section 204(f) of the Act; and the proposed issuance of securities is, therefore, not exempt by virtue of that Section from the requirement of Section 204 of the Act.

(4) The proposed issuance and sale of Bonds, as hereinafter authorized, will be for a lawful object, within the corporate purposes of Applicant and compatible with the public interest, which is appropriate for and consistent with the proper performance by Applicant or service as a public utility and which will not impair its ability to perform that service, and is reasonably necessary and appropriate for such purposes.

(5) Intervention by the above-mentioned petitioners may be in the public interest for purposes of Commission consideration of their petition.

(6) The matters asserted and activities alleged in the filed protest and petition to intervene by the Cities of Lafayette and Plaquemine, Louisiana, are irrelevant to the purpose of issuing bonds to refund short-term indebtedness heretofore authorized by this Commission.

(7) The matters asserted and activities alleged in the filed protest and petition to intervene by the Cities of Lafayette and Plaquemine, Louisiana, do not raise any issue which requires a hearing.

The Commission orders:

(A) The above-mentioned petitioners are hereby permitted to intervene in this proceeding subject to the rules and regulations of the Commission. Provided, however, That the admission of the afore-mentioned petitioner's shall not be construed as recognition by the Commission that the petitioners might be aggrieved because of any order or orders of the Commission entered in this proceeding.

(B) The above-mentioned petitioners request for hearing is denied.

R 304

(C) The proposed issuance and sale of Bonds upon the terms and conditions and for the purposes specified in the application as described above, is hereby authorized, subject to the provisions of this order.

(D) The proposed issuance and sale of Bonds at competitive bidding shall not be consummated until:

(i) Applicant shall have amended its application pursuant to the requirements of Section 34.2(g) of the Commission's Regulations under the Federal Power Act relating to compliance with competitive bidding requirements, and Section 34.2(h) of those Regulations relating to affiliation, and shall have either filed such amendments or shall have mailed them and advised the Commission by telephone and telegraph, as contemplated in Section 34.9 of the Regulations;

(ii) The Commission, by a further order, shall have approved the price to be received by Applicant for the proposed issuance of Bonds and the interest rate thereof.

(E) This authorization shall expire unless the transactions hereby authorized are consummated within 90 days from the date of issuance of this order.

(F) The foregoing authorization is without prejudice to the authority of the Commission or any other regulatory body with respect to rates, service, accounts, valuation, estimates or determinations of cost, or any other matter whatsoever now pending or which may come before this Commission.

(G) Nothing in this order shall be construed to imply any guaranty or obligation on the part of the United States with respect to any securities to which this order relates.

Gordon M. Grant,
Secretary.

R 310

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: John N. Nassikas, Chairman;
Carl E. Bagge, and Albert B. Brooke, Jr.

Gulf States Utilities Company) Docket No. E-7567

SUPPLEMENTAL ORDER AUTHORIZING
ISSUANCE OF FIRST MORTGAGE BONDS
(Issued December 9, 1970)

By order issued December 3, 1970, in the above-entitled matter, the Commission authorized Gulf States Utility Company (Applicant), to issue and sell at competitive bidding $30,000,000 principal amount of First Mortgage Bonds subject, among others, to the provisions set forth in paragraph (D) of that order, as follows:

(D) The proposed issuance and sale of Bonds at competitive bidding shall not be consummated until:

(i) Applicant shall have amended its application pursuant to the requirements of Section 34.2(g) of the Commission's Regulations under the Federal Power Act relating to compliance with competitive bidding requirements, and Section 34.2(h) of those Regulations relating to affiliation, and shall have either filed such amendments or shall have mailed them and advised the Commission by telephone and telegraph, as contemplated in Section 34.9 of the Regulations;

(ii) The Commission, by a further order, shall have approved the price to be received by Applicant for the proposed issuance of Bonds and the interest rate thereof.

Applicant, on December 9, 1970, filed an amendment, pursuant to the requirements of the afore-mentioned Commission order, in which it states, among other things that it proposes to accept, as representing the lowest

cost of money to be paid by the Applicant to the underwriters, the bid of The First Boston Corporation, Salomon Brothers and Eastman Dillon, Union Securities & Co. Underwriters to purchase the proposed $30,000,000 issue of First Mortgage Bonds carrying a coupon rate of 7 7/8% at a price to the Company of $99.42% of principal amount. Based upon an initial public offering price of 100.286% of principal amount, the yield will be 7.85% and the Company's cost of money will be 7.9259%.

The Commission finds:

(1) Applicant has satisfactorily complied with the requirements contained in paragraph (D) of the Commission's order issued December 3, 1970, in the above-entitled Docket; and the competitive bid it proposes to accept for the Bonds and the interest rate thereof are reasonable.

(2) The proposed issuance and sale of Bonds as hereinafter authorized, will be for a lawful object, within the corporate purposes of Applicant and compatible with the public interest, which is appropriate for and consistent with the proper performance of service by Applicant as a public utility and which will not impair its ability to perform that service, and is reasonably appropriate for such purposes.

The Commission orders:

(A) The price to be received by Applicant for the proposed Bonds and the interest rate thereof, are approved as reasonable.

(B) The proposed issuance and sale of Bonds referred to above, upon the terms and conditions, and for the purposes specified in the application, as supplemented by the amendment referred to above, are hereby authorized, subject only to the provisions of paragraphs (E), (F) and (G) and of the Commission's order issued December 3, 1970, in the above docket.

By the Commission

Gordon M. Grant,
Secretary.

R 312

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL POWER COMMISSION

In the Matter of)
) Docket No. E-7567
GULF STATES UTILITIES COMPANY)

APPLICATION FOR REHEARING
BY CITIES OF LAFAYETTE AND PLAQUEMINE, LOUISIANA

The Cities of Lafayette and Plaquemine, Louisiana, ("the Cities") pursuant to Section 313(a) of the Federal Power Act and Section 1.34 of the Commission's Rules of Practice and Procedure, hereby apply for rehearing of the orders of this Commission issued December 3, 1970 and December 9, 1970 in this proceeding authorizing issuance of $30,000,000 principal amount of First Mortage Bonds due in the year 2000 by Gulf States Utilities Company ("Gulf States"). The grounds upon which rehearing is sought are set forth below.

In their Protest and Petition to Intervene in this proceeding the Cities made several charges which the Commission has necessarily accepted as true for purposes of its orders since it refused to grant the statutorily required hearing.

(Section 204(b)). The Cities incorporate herein each and every ground raised in their original petition. Thus the Cities alleged that Gulf States, in combination with Louisiana Power & Light Company ("LP&L") and Central Louisiana Electric Company ("CLECO") had conspired and combined to suppress competitive electric systems which are municipally owned or are financed by the REA. The Cities set forth several examples of the results of this combination in restraint of trade in their petition.

In its order of December 3, 1970 this Commission found that the proposed issuance and sale of bonds will be ". . . . for a lawful object, . . . compatible with the public interest, which is appropriate for and consistent with the proper performance by [Gulf States] or [sic] service as a public utility . . . ." (Finding p. 4). This Commission goes on to find that "the alleged violations which the [Cities] attempt to raise in this proceeding are irrelevant to a requested authorization of securities." (Order, p. 3).

The Cities have alleged that Gulf States is utilizing its moneys acquired through authorization by this Commission for purposes not disclosed in its requests for authorization,

viz, the suppression of competitive municipal or coop electric systems. While it is true that Gulf States set out in fairly extensive fashion a description of its 1969-70 construction program in its application in Docket No. 7509, it did not represent that the moneys there authorized would be used only for that purpose. Rather, it stated that (Application, p. 7) "the proceeds from the Notes will be added to the general funds of the Company to be used, among other things, to provide part of the interim funds for construction expenditures." In its present filing in this docket, Gulf States asserts (Application, p. 5) only, in describing the purpose for which the securities are to be used, that "the proceeds from the sale of the New Bonds will be used by the Company to refund and pay off part of its commercial paper and short term notes to banks to be outstanding as of the date of issuance . . . The aforesaid commercial paper and short-term notes to banks constitute an issuance of securities previously authorized by the Commission (Docket No. E-7509)."

In light of the striking paucity of information furnished by Gulf States in both dockets as to the purposes for which the moneys are to be used, it is difficult to see any rational support for the Commission's findings that the issuance of bonds is for a "lawful object . . . compatible with

R 315

the public interest, which is appropriate for and consistent with the proper performance by [Gulf States of] service as a public utility . . . ." The fact is that the Commission does not know for what object these bonds were issued because the record does not reveal it any more than it revealed the purpose for which short term notes were issued in the earlier docket. Gulf States could, consistent with the representations it made, utilize these moneys as alleged by the Cities, for purposes of furthering its combination in restraint of trade. */

While the Cities can tell no better than the Commission exactly what this money has been or will be spent for, it appears to the Cities that those moneys have been or will be used to construct facilities which strengthen Gulf States' interties to LP&L and CLECO and allow each of them to expand their predatory competitive practices against the Cities and the REA coops, to continue the combined campaign to extinguish the LEC-DOW-Cities pool and to generally seek to subjugate the Cities and the coops. Moreover, unless the Commission's accountants have developed some system of tracing dollars of which the Cities are unaware, there is little logic to an argument that a given financing of this sort is used

*/ Indeed, Gulf States has under construction a 230 kv transmission line passing close to the LEC New Roads generating plant for the obvious purpose of occupying the transmission market and controlling the disposition of the plant's output in furtherance of its restraint of trade activities. Some of the bond funds are bound to flow to the support of this line.

for one specific purpose and that renewals of that financing cannot damage the Cities */ . The original note issuance resulted in moneys going into Gulf States for general corporate purposes, expanding the accounts which would be otherwise fed by the Company's operations.

The refinancing in issue here adds moneys to those accounts that would otherwise have to be paid back, thus expanding the resources which Gulf States can devote to destroying the pool. This result is clearly damaging to the Cities and is, as well, directly contrary to the statutory duty of this Commission to encourage meaningful interconnection and coordination. (Federal Power Act, Section 202.) Gulf States' activities are, as well, clearly contrary to the policies expounded in the Commission's National Power Survey.

The finding by the Commission (Findings, p. 4) that the violations which the Cities have sought to raise are ". . . . irrelevant to the purpose of issuing bonds to refund short term indebtedness heretofore authorized by this Commission" is ambiguous. If the Commission means that the

*/ It is not clear from the Commission's Order whether or not such an assertion is being made.

issues are irrelevant because this is a refunding rather than a new funding, then the Cities believe the Commission factually to be in error for the reasons set forth supra. If, on the other hand, the Commission is saying that the antitrust consequences which result from its authorization of funds are irrelevant to its functions under Section 204 of the Act, then the Commission is taking too narrow a view of its authority under that section. Neither the Act on its face nor the legislative history of Section 204 will support such an abdication of responsibility. Cf. Denver & Rio Grande Western Ry Co. v. United States, 387 U.S. 485 (1967). At the very least the Commission should have conditioned the funding authority granted, so that it would not be used to the detriment of the Cities or in a manner inimical to the proposed pool, and instituted an investigation.

This Commission, like other administrative agencies established to protect the public interest, is not an umpire calling balls and strikes, but has an active, affirmative responsibility to see to it that all pertinent issues are fully aired. Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608 (CA 2, 1965) cert. denied 384 U.S. 941 (1966);

R 318

Udall v. FPC, 387 U.S. 428 (1967); Michigan Consolidated Gas Co. v. FPC, 283 F.2d 204, (CADC 1960), cert. denied 364 U.S. 913. The Commission has failed to discharge this affirmative duty in this proceeding.

CONCLUSION

For the foregoing reasons the Commission should grant rehearing, withdraw its orders of December 3 and 9, 1970, and set this case for full hearing, directing its Staff to pursue an investigation of Gulf States activities in combination with LP&L and CLECO, and take such other and further action as circumstances may require.

Respectfully submitted,

George Spiegel

Robert C. McDiarmid

Attorneys for Cities of Lafayette and Plaquemine, Louisiana

December 15, 1970

R 319

VERIFICATION

DISTRICT OF COLUMBIA, SS:

Robert C. McDiarmid, being first duly placed upon affirmation, deposes and says that he is the attorney for the Cities of Lafayette and Plaquemine, Louisiana, and that he is authorized on behalf of said parties to execute and file this Application for Rehearing; that he has read the foregoing Application for Rehearing and is familiar with the contents thereof, and that the matters and things therein set forth are true and correct to the best of his knowledge, information and belief.

Robert C. McDiarmid

Subscribed and affirmed before me this 15th day of December, 1970.

My commission expires: September 30, 1974

Exhibit N-2
(FPC)
Amendment
No. 4
R 375

As filed with the Securities and Exchange Commission on December 9, 1970

Registration No. 2-38740

SECURITIES AND EXCHANGE COMMISSION

Washington, D. C. 20549

POST-EFFECTIVE AMENDMENT NO. 1

To

FORM S-9

REGISTRATION STATEMENT

Under

THE SECURITIES ACT OF 1933

Gulf States Utilities Company

(Exact name of registrant as specified in charter)

P. O. BOX 2951, BEAUMONT, TEXAS 77704
(Address of principal executive offices)

F. R. SMITH, *President*
Gulf States Utilities Company
P. O. Box 2951
Beaumont, Texas 77704

J. M. STOKES, *Vice President—Finance and Secretary*
Gulf States Utilities Company
P. O. Box 2951
Beaumont, Texas 77704
(Names and addresses of agents for service)

R377

IN CONNECTION WITH THIS OFFERING, THE PURCHASERS MAY OVER-ALLOT OR EFFECT TRANSACTIONS WHICH STABILIZE OR MAINTAIN THE MARKET PRICE OF THE SECURITIES OFFERED HEREBY OR OTHER BONDS OF THE COMPANY AT LEVELS ABOVE THOSE WHICH MIGHT OTHERWISE PREVAIL IN THE OPEN MARKET. SUCH STABILIZING, IF COMMENCED, MAY BE DISCONTINUED AT ANY TIME.

USE OF PROCEEDS

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Total	$203,000,000

It is anticipated that the Company will, in addition to the funds obtained from this offering and funds internally generated, require prior to the end of 1971, approximately $66 million from outside sources. It is contemplated that some portion of this amount will take the form of permanent financing, the nature, time and extent of which has not yet been determined.

Total gross additions to the plant account of the Company during the period January 1, 1965 through August 31, 1970, amounted to $509,598,939, and during the same period retirements from the plant account amounted to $36,167,677. Gross additions during the period amounted to approximately 57% of total net plant at August 31, 1970.

HISTORY AND BUSINESS

The Company was incorporated August 25, 1925, under the laws of the State of Texas and is engaged principally in the business of generating, transmitting, distributing and selling at retail electric energy in a 28,000 square mile area in southeastern Texas and in south central Louisiana, extending a distance of over 350 miles along the Texas-Louisiana Coast. The Company's electric system is interconnected, and interconnections with other utilities are maintained for the exchange of power. The Company also conducts a steam products business and sells natural gas in the Baton Rouge, Louisiana area.

R377

IN CONNECTION WITH THIS OFFERING, THE PURCHASERS MAY OVER-ALLOT OR EFFECT TRANSACTIONS WHICH STABILIZE OR MAINTAIN THE MARKET PRICE OF THE SECURITIES OFFERED HEREBY OR OTHER BONDS OF THE COMPANY AT LEVELS ABOVE THOSE WHICH MIGHT OTHERWISE PREVAIL IN THE OPEN MARKET. SUCH STABILIZING, IF COMMENCED, MAY BE DISCONTINUED AT ANY TIME.

USE OF PROCEEDS

The net proceeds to be received by Gulf States Utilities Company (the "Company") from the sale of the Bonds offered hereby (the "New Bonds"), after deduction of expenses and exclusive of accrued interest, will be used by the Company to pay off part of its short-term notes having various maturity dates extending into 1971, of which it is estimated $55,000,000 will be outstanding at the time of the sale of the New Bonds. The proceeds from the notes being paid were used in connection with the Company's construction program and for other corporate purposes.

All of the short-term notes expected to be outstanding will either be in the form of commercial paper, or short-term notes issued under the Company's revolving credit agreements with banks which provide for loans maturing on December 31, 1970, up to an aggregate of $27,330,000. Upon prepayment of any note or part thereof issued under the credit agreements, the full amount of such payment shall be immediately restored to the aggregate principal amount of the credit available under such agreements. On or before December 31, 1970, the Company expects to consummate new similar revolving credit agreements with banks providing for loans maturing on December 31, 1971, up to an aggregate of $40,000,000.

CONSTRUCTION PROGRAM

On September 10, 1970, the Company's system load reached a peak of 3,039,400 kilowatts and at that time the Company's generating capability and firm power contracts provided a reserve of approximately 21%. The 1970 peak represents a 66% increase over that of 1965. To meet anticipated growth in system load, the Company has scheduled in the five-year period 1970 through 1974, the installation of four 580,000 kilowatt units and two 265,000 kilowatt units. The cost of new construction in 1970 is expected to be $110,000,000 and the cost of new construction in 1971 is expected to be approximately $93,000,000.

The 1970-71 program consists of the following principal items:

Additional electric and steam production plant	$ 92,760,000
Additional electric transmission and distribution facilities	105,370,000
Other additional electric improvements	3,190,000
Additional gas plant	1,680,000
Total	$203,000,000

It is anticipated that the Company will, in addition to the funds obtained from this offering and funds internally generated, require prior to the end of 1971, approximately $66 million from outside sources. It is contemplated that some portion of this amount will take the form of permanent financing, the nature, time and extent of which has not yet been determined.

Total gross additions to the plant account of the Company during the period January 1, 1965 through August 31, 1970, amounted to $509,598,939, and during the same period retirements from the plant account amounted to $36,167,677. Gross additions during the period amounted to approximately 57% of total net plant at August 31, 1970.

HISTORY AND BUSINESS

The Company was incorporated August 25, 1925, under the laws of the State of Texas and is engaged principally in the business of generating, transmitting, distributing and selling at retail electric energy in a 28,000 square mile area in southeastern Texas and in south central Louisiana, extending a distance of over 350 miles along the Texas-Louisiana Coast. The Company's electric system is interconnected, and interconnections with other utilities are maintained for the exchange of power. The Company also conducts a steam products business and sells natural gas in the Baton Rouge, Louisiana area.

R 378

For the 12-month period ended August 31, 1970, 90% of the Company's operating revenues were derived from the electric utility business, 7% from the steam products business and 3% from the gas business. Of the electric operating revenues, 55% were derived from within Louisiana and 45% from within Texas. The gas and steam products businesses are conducted entirely in Louisiana.

The Company and ten other investor-owned electric utility companies comprising the South Central Electric Companies have an agreement with The Tennessee Valley Authority (TVA) to interchange 1,500,000 kilowatts of electric power. The Company's share of the exchange is 215,000 kilowatts. The companies have constructed a 500,000 volt electric transmission network linking their electric systems in Louisiana, Texas, Arkansas, Oklahoma, Mississippi, Missouri and Kansas. The Company is extending the 500,000 volt transmission line into its own service area to help assure future reliability of service.

The Company and two other operating utility companies have an agreement with the Sabine River Authorities of Louisiana and Texas under which the Company is to purchase 50% of the electric output of the Toledo Bend Hydroelectric plant. The Company has a commitment to pay approximately $1,000,000 annually through May 1, 2004, and approximately $800,000 annually thereafter for 14 years.

The electric business is substantially free from direct competition with municipalities or with other investor-owned electric utilities. There are 19 rural electric cooperatives, sponsored by the Rural Electrification Administration, operating within or adjacent to the service area of the Company. These cooperatives purchase their entire power supply from the Company or from adjacent systems. The operation and extension of these cooperatives in certain areas tend to restrict expansion of the Company's system in such areas. However, the Company is continuing to extend its service into rural areas.

In September, 1964, the Rural Electrification Administration approved a loan of $56,521,000 to Louisiana Electric Cooperative, Inc., a super-cooperative formed by 12 of the 13 REA cooperatives in Louisiana, for the proposed construction of a 200,000 kilowatt generating plant and approximately 1,800 miles of transmission lines in Louisiana, some of which would duplicate transmission facilities of the Company. Construction of the generating plant is proceeding. The Company and two other Louisiana electric utility companies which also serve the cooperatives are presently negotiating with Louisiana Electric Cooperative, Inc., its members and the Rural Electrification Administration to use such utility companies' facilities to wheel the power generated by the 200,000 kilowatt generating plant to certain of the distributive cooperatives, thereby making it unnecessary for the super-cooperative to construct duplicate transmission lines.

Four of the twelve rural electric cooperatives which organized the Louisiana Electric Cooperative, Inc., presently take part or all of their electric supply from the Company. During the 12 months ended August 31, 1970, the Company sold to these four cooperatives 300,493,013 kilowatt-hours, or 2% of total sales to electric customers, for a total revenue of $1,954,603, or 1% of total revenue from electric customers.

In Baton Rouge, Louisiana, the Company operates a specially designed steam-electric extraction plant which has been furnishing process steam and by-product electric energy to Ethyl Corporation and Humble Oil & Refining Company since the 1930's and to Uniroyal since 1950. The Humble Oil & Refining Company agreement runs to January 1, 1978, and continues after the initial term until cancelled by three years' written notice. The contracts with Uniroyal and with the Ethyl Corporation are presently cancellable on three years' written notice. The Company constructed and owns a specially designed steam-electric extraction plant in Baton Rouge which furnishes the requirements of the Industrial Chemicals Division of Allied Chemical Corporation for process steam and electricity. It is being operated and maintained by Allied under a twenty-year contract, which runs to February 1, 1989, and under which Allied makes annual payments to the Company, including amounts sufficient to amortize the cost of such plant over the term of the contract.

Boiler gas for the Company's various generating plants is provided for under long-term contracts with Humble Oil & Refining Company and Texas Intrastate Gas Company in Texas and with Monterey Pipeline Company and United Gas Pipe Line Company in Louisiana. These contracts run until 1985, 1985, 1981, and 1987, respectively. The contract with United Gas Pipe Line Company contains provisions for price re-determination in 1977 and 1982. Part of the gas to be supplied by United Gas has been and may be supplied by Texaco, Inc. under a separate agreement. United Gas Pipe Line Company has informed the Company that commencing in November, 1970, its deliveries to the Company's Roy S.

R 379

Nelson and Willow Glen Stations in Louisiana will be limited to amounts which are less than the Company presently estimates would otherwise be used by such plants. However the Company does not expect this to result in any reduction in or interruption of service to its customers, since the Company believes it has adequate alternate sources of power or alternate supplies of fuel to meet its operating requirements. These alternatives would increase the Company's cost of power in varying degrees, but the Company does not anticipate that any such increase would materially affect the net earnings of the Company.

The Company distributes natural gas purchased under an agreement with Mid Louisiana Gas Company (which agreement is subject to approval by regulatory bodies having jurisdiction) in Baton Rouge and its environs which have an estimated population of 210,000. The contract with Mid Louisiana expires December 31, 1975. The Louisiana Public Service Commission recently granted the Company a 9.42% increase in the rates for the sale of gas so distributed.

The Company has a contract with the International Brotherhood of Electrical Workers which is the collective bargaining representative of employees formerly represented by the Independent Electrical Workers Union. A strike, which became system-wide April 24, 1970, was ended on July 5, 1970 with the ratification of the contract. The contract runs until July 8, 1972 and contains provisions, among others, for an immediate 7% wage increase, a wage increase on January 3, 1971 (5½%), and on October 3, 1971 (5%).

REGULATION

The rates of the Company in Texas are subject to the jurisdiction of municipal authorities, and as to all rates, including those in unincorporated towns and rural areas, the District Court has authority to declare unlawful an extortionate or unreasonable rate. Texas does not have a state utility regulatory body with jurisdiction over the rates or issuance of securities of the Company.

In Louisiana (in which state the Company is duly qualified to carry on business as a foreign corporation), a statute provides that the Louisiana Public Service Commission shall have jurisdiction over the rates and services of public utility companies. There is some question, in view of certain provisions in the Louisiana Constitution giving such jurisdiction to some municipalities, as to whether the aforesaid statute is constitutional as applied to such municipalities. In the opinion of the Company's counsel neither the Louisiana Public Service Commission nor any other governmental authority in the State of Louisiana has any jurisdiction over the issuance of securities by the Company.

In certain of its activities, including the issuance and sale of the securities covered by this Prospectus, the Company is subject to the jurisdiction of the Federal Power Commission (FPC). On November 2, 1970 the Cities of Lafayette and Plaquemine, Louisiana, filed a Protest and Petition to Intervene in the proceeding initiated by the Company before the FPC for authorization to issue the New Bonds, alleging that the Company, together with Louisiana Power and Light Company and Central Louisiana Electric Company, Inc., may be engaging in actions violative of the anti-trust laws, the Federal Power Act, and the Public Utility Holding Company Act to their detriment. In their Protest and Petition to Intervene the Cities opposed the authorization of the issue of the New Bonds unless and until the Company purged itself of the alleged violations or unless the FPC conditioned its authorization upon cessation of the alleged unlawful actions and the establishment of a program to rectify the damage alleged to be suffered by the Cities, and requested a hearing. The FPC has granted the Cities' petition to intervene, denied their request for a hearing and authorized the issuance and sale of the New Bonds without any of the conditions sought by the Cities. The Cities may have the right to request a rehearing on their petition by the FPC and to appeal from the action taken by it. However, in the opinion of Messrs. Orgain, Bell & Tucker, counsel for the Company, the validity of the New Bonds will not be affected by the outcome of any such further proceedings.

The Company is not subject to the Public Utility Holding Company Act of 1935.

The Company may be subject to regulation by various federal, state and local environmental control authorities.

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UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: John N. Nassikas, Chairman;
Lawrence J. O'Connor, Jr., John A. Carver, Jr.,
and Albert B. Brooke, Jr.

Gulf States Utilities Company) Docket No. E-7567

ORDER DENYING APPLICATION FOR REHEARING

(Issued January 13, 1971)

By order issued December 3, 1970, the Commission authorized Gulf States Utilities Company (Applicant) to issue $30,000,000 principal amount of First Mortgage Bonds, due 2000, subject, however, to further Commission approval of the price of the Bonds to be paid to the Applicant and the interest rate of the Bonds. The Commission also granted leave to intervene to the Cities of Lafayette and Plaquemine, Louisiana, based upon their protest and petition to intervene filed November 2, 1970; Hearing in the proceeding was denied.

By supplemental order issued December 9, 1970, the Commission approved the price of the Bonds and the interest rate thereof, thereby authorizing the immediate issuance of the Bonds.

Intervenors on December 16, 1970, filed in this proceeding an application for rehearing of the Commission's orders of December 3, 1970 and December 9, 1970, seeking withdrawal of those orders, setting the case for full hearing, and directing Commission Staff to pursue an investigation of Applicant's activities. In their application for rehearing, Intervenors incorporate all grounds raised in their original petition to intervene as previously considered by the Commission. In addition, Intervenors present the further argument that the Applicant's described use of the funds authorized in Docket No. E-7567 and Docket No. E-7509, as set forth in the applications, are not sufficient to support the Commission's findings that the issuance of Bonds is for a "lawful object . . . compatible with the proper performance by (Gulf States of) service as a public utility. . ."

The Commission finds:

The grounds for rehearing set forth in the application filed on December 16, 1970, by the Cities of Lafayette and Plaquemine, Louisiana in Docket No. E-7567 present no facts or legal principles which would warrant any change in or modification of the aforementioned Commission orders issued December 3, 1970 and December 9, 1970.

The Commission orders:

The application for rehearing filed by the Cities of Lafayette and Plaquemine, Louisiana on December 16, 1970, in Docket No. E-7567 is denied.

By the Commission.

(S E A L)

Gordon M. Grant,
Secretary.

71-1178

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Supreme Court, U. S.
FILED
MAR 13 1972
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. .....

GULF STATES UTILITIES COMPANY,
Petitioner,

v.

FEDERAL POWER COMMISSION,
CITY OF LAFAYETTE, LOUISIANA,
CITY OF PLAQUEMINE, LOUISIANA,
Respondents.

PETITION OF GULF STATES UTILITIES COMPANY FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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FIDELITY PRINTING COMPANY, INC., HOUSTON

INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	3
Statement	3
Reasons for Granting the Writ	4
Conclusion	13

Appendices

A	Court of Appeals Opinion	1a
B	Court of Appeals Judgment	30a
C	Court of Appeals Order Overruling Motion for Rehearing	31a
D	Federal Power Commission Order Authorizing Issuance of Bonds, Granting Intervention and Denying Hearing	32a
E	Federal Power Commission Supplemental Order	38a
F	Federal Power Commission Order Denying Application for Rehearing	41a
G	Statutes Involved	43a

CITATIONS

Cases

Alabama Electric Cooperative v. S.E.C., 122 U.S. App. D.C. 367, 353 F.2d 905 (1965)	5
California v. Federal Power Commission, 369 U.S. 482 (1962)	7
California Motor Transport Co., et al, v. Trucking Unlimited, 92 S.Ct. 609 (January 13, 1972)	10
Cardillo v. Liberty Mutual Insurance Co., 330 U.S. 469 (1947)	11
City of Pittsburgh v. Federal Power Commission, 99 U.S. App. D.C. 113, 237 F.2d 741 (1956)	5, 7

PAGE

Denver & Rio Grande Western R. Co. v. United States, 387 U.S. 485 (1967) 5, 6, 7, 8, 9

Eastern Railroad's President's Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961) 10

Federal Power Commission v. Florida Power & Light Co., 92 S. Ct. 637 (January 12, 1972) 11

Gainesville Utilities Dept. v. Florida Power Corp., 402 U.S. 515 (May 24, 1971) 11

Gray v. Powell, 314 U.S. 402 (1941) 11

Interstate Commerce Commission v. Jersey City, 322 U.S. 503 (1944) 11

McLean Trucking Co. v. United States, 321 U.S. 67 (1944) 8

Municipal Elec. Assn. of Massachusetts v. SEC, 134 U.S. App. D.C. 145, 413 F.2d 1052 (1969) 5

Municipal Elec. Assn. of Massachusetts v. SEC, 136 U.S. App. D.C. 175, 419 F.2d 757 (1969) 5

Northern Natural Gas Co. v. Federal Power Commission, 130 U.S. App. 220, 399 F.2d 953 (1968) 5

Pacific Power & Light Co., 27 F.P.C. 623 (1962) 9

Securities and Exchange Commission v. Central-Illinois Securities Corp., 338 U.S. 96, 127 (1949) 11

Securities and Exchange Commission v. Chenery Corp., 332 U.S. 194 (1947) 11

Securities and Exchange Commission v. New England Electric System, 390 U.S. 207 (1968) 10

United States v. Drum, 368 U.S. 370 (1962) 11

Udall v. Tallman, 380 U.S. 1 (1965) 9

Statutes

Federal Power Act 9, 12

Section 201, 16 U.S.C. §824 ..... 3, 8

Section 202, subsections (a) and (b), 16 U.S.C. §824a 3, 10

Section 203, 16 U.S.C., §824b 3, 10

Section 204, 16 U.S.C., §824c 2, 3, 5, 9, 10, 11

Section 205, 16 U.S.C., §824d 3, 10

PAGE

Section 206, 16 U.S.C., §824e 3, 10
Section 305, 16 U.S.C., §825d 3, 10
Section 306, 16 U.S.C., §825e 3, 10
Section 307, 16 U.S.C., §825f 3, 10
Section 313, 16 U.S.C., §825l 3, 11

Clayton Act
Section 7, 15 U.S.C. §18 ..... 7, 10
Section 11, subsections (a) and (b), 15 U.S.C. §21 ..... 3, 7

Interstate Commerce Act
Section 20a, 49 U.S.C. 20a 5, 8, 9

Public Utility Holding Company Act
Section 6, 15 U.S.C., §79f 2, 10
Section 7, 15 U.S.C., §79g 2, 10

Sherman Act 4, 7, 9
28 U.S.C. §1254(1) 2

Miscellaneous

National Transportation Policy 8, 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. .....

GULF STATES UTILITIES COMPANY,
Petitioner,

v.

FEDERAL POWER COMMISSION,
CITY OF LAFAYETTE, LOUISIANA,
CITY OF PLAQUEMINE, LOUISIANA,
Respondents.

PETITION OF GULF STATES UTILITIES COMPANY FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner, Gulf States Utilities Company ("Gulf States"), prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the District of Columbia Circuit, decided October 12, 1971, petitioner's Motion for Rehearing overruled December 15, 1971.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit, not yet reported, is

App. A, *infra*, at p. 1a. Judgment of the Court of Appeals is App. B, *infra*, at p. 30a. Order overruling petition for rehearing is App. C, *infra*, at p. 31a. The order of the Federal Power Commission ("FPC") authorizing Gulf States to issue $30,000,000 principal amount of First Mortgage Bonds is App. D, *infra*, at p. 32a; supplemental order approving price and interest rate is App. E, *infra*, at p. 38a; and FPC order overruling motion for rehearing filed by Cities of Lafayette and Plaquemine, Louisiana ("Cities"), Intervenors in the proceeding before the FPC, is App. F, *infra*, at p. 41a.

JURISDICTION

The order of the United States Court of Appeals for the District of Columbia Circuit was entered October 12, 1971. Petition for rehearing was denied on December 15, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the FPC has a duty to investigate charges of Sherman Act violations under §204 of the Federal Power Act.

2. Whether the FPC and the SEC have different duties for investigation of alleged Sherman Act violations in proceedings under §204 of the Federal Power Act and under §6 (a) and §7 (d) (6) of the Public Utility Holding Company Act, respectively.

3. Whether the Court of Appeals can require the FPC to investigate antitrust allegations found to be irrelevant by the FPC.

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STATUTES INVOLVED

Sections 201, 202, subsections (a) and (b), 203, 204, 205, 206, 305, 306, 307, and 313 of the Federal Power Act, 16 U.S.C. §824, §824a, subsections (a) and (b), §824b, §824c, §824d, §824e, §825d, §825e, §825f, and §825 1, and §11, subsections (a) and (b) of the Clayton Act 15 U.S.C. §21, subsections (a) and (b), are set forth in Appendix G, *infra*, pp. 43a-59a.

STATEMENT

Section 204 of the Federal Power Act (App. G, *infra*, 47a-49a) provides that no public utility shall issue any security until, upon application by the public utility, the FPC by order authorizes such issue. It also provides the FPC shall make such order only if it finds among other things that such issue is for some lawful object and compatible with the public interest.

On October 12, 1970, Gulf States, a public utility, filed with the FPC an application for an order authorizing it to issue and sell bonds at competitive bidding (R. pp. 1-12, incl.).[1] The application stated that the proceeds from the sale of the bonds would be used to pay off part of the Company's short-term indebtedness. Cities filed a verified protest which, with appendices, consisted of 106 pages (R. pp. 54-160, incl.) charging Gulf States with engaging in frivolous and repetitive litigation and mounting a public relations drive and lobbying effort in concert with two other utility companies over a period of years "apparently" violative of the antitrust laws, among others, to Cities' damage. Gulf States answered (R. p. 263) pointing out that the bond proceeds would be used merely to refund short-term secur-

[1] "R" refers to the printed appendix filed in the Court of Appeals in connection with the appeal which resulted in the judgment (App. B, *infra*, p. 30a) which Gulf States asks this court to review.

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ities theretofore authorized by an uncontested FPC order and urging the irrelevancy of intervenors' contentions on that and other grounds.

The FPC permitted Cities' intervention but without a hearing overruled the same and granted Gulf States' authorization for issuance of the bonds (App. D, *infra*, at p. 32a). Cities' petition for rehearing was overuled by the FPC (App. F, *infra*, at p. 41a). Cities filed Petitions for Review of Orders of the FPC in the U. S. Court of Appeals for the District of Columbia Circuit, where it was docketed as Cause No. 71-1041 and consolidated, for purposes of argument, with Causes Nos. 24,764 and 24,963 wherein Cities were petitioners, Securities and Exchange Commission ("SEC") was respondent and Louisiana Power & Light Company was intervenor. The Court disposed of all three numbered causes in a single opinion (App. A, *infra*, p. 1a). Facts and contentions of the parties are more extensively set forth in the opinion of the Court of Appeals below (App. A, *infra*, p. 1a).[2]

REASONS FOR GRANTING THE WRIT

The Court of Appeals has imposed an additional duty upon the FPC to investigate alleged Sherman Act violations and has relieved the SEC of such duty under comparable circumstances, all in face of determinations by both commissions that the activities alleged to be anticompetitive in both proceedings were irrelevant to the purposes of the respective proceedings. In so doing, such Court of Appeals has decided important questions of federal law which have not been, but should be, settled by this Court, and, the Court of Appeals in attempting to reconcile its own prior deci-

[2] The Court's statement (App. A, *infra*, p. 10a) of Cities' argument in petition for rehearing before the FPC is erroneous but not thought to be material to consideration of this petition.

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ions,[3] has left the only court interpretations in this vital area of law in a confused and inconsistent state.

The FPC neither filed motion for rehearing with the Court of Appeals below nor petitioned this Court for *certiorari*. This should not reflect on the importance of the issue. The FPC may have been stung by the implication of counsel for the Cities that the FPC's position was that of "an ingenious Commission which wishes to avoid regulatory problems by narrowing its own jurisdiction."[4]

1. The importance of granting this petition is documented by clear evidence that if this case is not reviewed the FPC and public utilities subject to its jurisdiction will labor under a court ordered construction of §204 of the Federal Power Act arrived at without objective consideration because of a mistaken belief that it was compelled by an inapposite opinion of the Supreme Court. The Court below selected the opinion of the Supreme Court in *Denver & Rio Grande Western R. Co. v. United States*[5] as the pattern for its opinion and judgment. If that opinion does not support the Court of Appeals, then it has no support. The Court of Appeals noted that §204 of the Federal Power Act is almost identical with certain provisions of §20a of the Interstate Commerce Act which were interpreted in the Supreme Court's opinion in *Denver & Rio Grande* and treated that opinion as controlling here.

The Court of Appeals failed to note that the Supreme Court in its opinion in *Denver and Rio Grande* written by Justice Brennan warns:

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[3] *Alabama Electric Cooperative v. SEC*, 122 U.S. App. D.C. 367, 353 F.2d 905 (1965); *Municipal Electric Ass'n of Massachusetts v. SEC*, 134 U.S. App. D.C. 145, 413 F.2d 1052 (1969); *Municipal Elec. Ass'n of Mass. v. SEC*, 136 U.S. App. D.C. 175, 419 F.2d 757 (1969); *City of Pittsburgh v. FPC*, 99 U.S. App. D.C. 113, 237 F.2d 741 (1956); *Northern Natural Gas Co. v. FPC*, 130 U.S. App. D.C. 220, 399 F.2d 953 (1968). All of these cases are mentioned in the opinion of the Court below (App.A, *infra*, p. 1a.).

[4] Brief for Petitioner Cities in Court of Appeals below, p. 20.

[5] 387 U.S. 485 (1967)

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> *Section 20a, like § 5, must after all be read in the context of overall ICC responsibilities. The responsibility under § 11 of the Clayton Act to enforce that Act's provisions is one of them.*[6] (Emphasis supplied.)

Further in the same opinion, it is said:

> . . . *the Clayton Act* is prohibitive, and *imposes a positive obligation upon the ICC to act. The Commission is directed, whenever it has reason to believe any carrier within its jurisdiction is violating § 7, to "issue and serve* upon such person . . . *a complaint* stating its charges . . . *and containing a notice of a hearing.*" 15 U.S.C. § 21(b), Section 16, 15 U.S.C. § 26, excepts from the power of private persons to bring § 7 suits for injunctive relief all cases involving matters subject to ICC jurisdiction. By thus limiting the authority of private persons to institute court proceedings to enjoin § 7 violations, *this provision underscores the ICC's responsibility to act when such violations are brought to its attention.*[7] (Emphasis supplied.)

The Court of Appeals erred in tracking the language just quoted to reach its own decision in the instant case. In *Denver and Rio Grande*, the Court was reviewing an application to the ICC for authority to issue securities to another carrier in which it was either conceded or assumed *arguendo* by all parties that "anticompetitive" effects were involved.[8] The Court said that the ICC need not grant a hearing in every case, but that when the ICC exercises its discretion to approve issuances without first considering important competition issues, the reviewing court must closely scrutinize its action in light of the ICC's *statutory obligations* to protect the public interest and *to enforce the antitrust laws.*[9]

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[6] 387 U.S. 485, 493 (1967)

[7] 387 U.S. 485, 502

[8] At page 491

[9] 387 U.S. 485, 498. This statement is included by the Court below in a quotation (App. A, *infra*, p. 15a) used to support its insistence on close scrutiny by the reviewing court of omission of a hearing on anticompetitive issues apparently without the Court noticing that the FPC does not have the same statutory obligation as the ICC.

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Having noted [10] the ICC's responsibility under §11 of the Clayton Act, the Court concludes its opinion[11] with the statement:

> The Government was correct in its position before the ICC that this record placed "before the Commission *serious questions under section 7 of the Clayton Act," requiring a hearing.* (Emphasis supplied.)

The FPC (like the SEC) *is not among the governmental agencies authorized by §11(a) to enforce §7 of the Clayton Act.* Sections 11(a) and (b) of the Clayton Act (App. G, *infra*, p. 57a) confirm what the Supreme Court has elsewhere remarked that *"Other administrative agencies are authorized to enforce §7 of the Clayton Act when it comes to certain classes of companies or persons; but the Federal Power Commission is not included in the list."*[12] (Emphasis supplied.) Thus, *Denver and Rio Grande* would not have been apt authority in the instant case even if Gulf States had been accused of Clayton Act violation. But Cities have invited the FPC's attention to an "apparent" violation of the Sherman Act. The Court below has said previously in *City of Pittsburg* v. *Federal Power Commission* that "... the Commission has no power to enjoin conduct as illegal under the Sherman Act or even to declare such illegality...."[13] If the FPC in the remanded proceedings should enter an order placing restrictions on the use of the proceeds of future securities issues (the proceeds of the Bonds have long since been used for the purpose specified in the FPC's order), would this not be doing by indirection what the same Court has said can not be done directly? Would this not be in effect a prospective judgment of illegal pur-

[10] 387 U.S. 485, 501
[11] At page 507.
[12] *California v. Federal Power Commission*, 369 U.S. 482, 486.
[13] 237 F.2d 741, 754.

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pose and in effect an injunction against anticipated operations or activities the FPC judged might be illegal?[14]

The Supreme Court in *Denver & Rio Grande* declared another reason for reading anticompetitive issues into the public interest standards of §20a of the Interstate Commerce Act. Justice Brennan, speaking for the Court, said:

> The responsibility to advance the National Transportation Policy, read into the "public interest" standard of §5, is another persistent and overriding duty, equally applicable to §20a.[15]

The National Transportation Policy [16] provides for regulation to accomplish various things:

> *without unjust discriminations, undue preferences, or advantages, as unfair or destructive competitive practices.* (Emphasis supplied.)

The declaration of policy contained in §201 of the Federal Power Act (App. G, *infra* p. 43a) contains nothing similar and nothing concerning competitive practices.

What the opinion in *Denver and Rio Grande* makes crystal clear is that the ICC must read into the "public interest" test of §20a of the Interstate Commerce Act anticompetitive responsibilities imposed upon it by the Clayton Act and

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[14] The bonds were sold when authorized by FPC supplemental order issued December 9, 1970, almost a year before the Court of Appeals remanded the cause for FPC attention to anticompetitive issues. Thus, the FPC was not directed to reconsider whether or not the bonds should be authorized but to consider whether or not evidence of unlawful anticompetitive activity should be investigated and, presumably, if evidence of continuing antitrust violations was discovered, to take appropriate action. What such action should be is not easy to envision. One possible action would be to report possible violation to the Attorney General. However, §314(a) of the Federal Power Act does not make it the duty of the FPC to report antitrust violations to the Attorney General as does §20a of the Natural Gas Act.

[15] 387 U.S. 485, 493. See also *McLean Trucking Co.* v. *United States*, 321 U.S. 67 (1944).

[16] 54 Stat. 899, 49 U.S.C.A. (note preceding §1.)

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the National Transportation Policy. By failing to recognize those factors, as it must in fairly judging FPC responsibility under §204 of the Federal Power Act, and in relying on a similarity of language between §204 and parts of §20a, the Court below fell into the error of tracking in our case the directions of the Supreme Court to the ICC in *Denver and Rio Grande.*

Had the Court of Appeals not felt shackled by *Denver,* it might have followed the declared practice of the Supreme Court and shown deference to the interpretation given the statute by the agency charged with its administration[17] by following the FPC's construction of §204 in *Pacific Power & Light Co.,* 27 F.P.C. 623 (1962) noticed by the Court below at App. A, *infra,* pp. 16a-17a. The FPC there held the purpose of §204 is to prevent issuance of securities which might impair financial security or ability to perform public utility responsibilities.

A subsidiary question, if the FPC is assumed to have some Sherman Act responsibility under §204 of the Federal Power Act and if it is assumed that the proceeds of the securities to be issued might be used in furtherance of Sherman Act violations, is whether it has a duty to consider alleged Sherman Act violations not claimed to arise from or be related to operations or activities subject to FPC regulation. In the instant case, Cities alleged Gulf States instigated a series of lawsuits over a period of five years which delayed the use of funds by a public electric authority not a party to this litigation, engaged in frivolous and repetitive litigation and mounted a public relations drive and lobby effort against such public authority. These are activities over which the Federal Power Act gives the

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[17] *Udall* v. *Tallman,* 380 U.S. 1 (1965).

FPC no regulatory responsibility.[18] If Gulf States deemed it in its best interest to endeavor to protect its business and retain its customers against the activities of competitors by filing lawsuits or engaging in public relations drives, the Federal Power Act did not require it to first obtain authorization from the FPC.[19]

2. While the structure of §204 of the Federal Power Act differs from that of §6 (15 USC, §79f) and §7 (15 USC, §79g) of the Public Utility Holding Company Act (49 Stat. 838, as amended, 15 USC §79, *et seq.*), there is no support in either logic or policy for giving them different interpretations in the respects under consideration.

3. The Court of Appeals below has decided a federal question in a way which is in conflict with applicable decisions of the Supreme Court in that it has set aside a find-

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[18] Although the Court below discussed (App. A, *infra*, pp. 18a, 27a), some of the following sections, the Court referred to no allegations of violations by Gulf States or requests for relief by Cities, and there were none, within the scope of §202 in subsections (a) and (b) (App. G, *infra*, pp. 44a-45a) relating to interconnections, §203 (App. G, *infra*, p. 46a) to merger, consolidation and acquisitions of another public utility, §205 and §206 (App. G, *infra*, pp. 49a-52a) to rates, and §305 (App. G, *infra*, p. 52a) to interlocking directorates. Had charges been made of violations under those sections, §306 (App. G, *infra*, p. 53a) provides for complaints and §307 (App. G, *infra*, p. 54a) for investigations by the FPC of violations of the chapter.

[19] The Supreme Court has held that publicity campaigns and litigation directed toward obtaining governmental action adverse to prospective competitors is not illegal merely because affected by an anticompetitive purpose nor is it illegal for one to seek action on laws in hope of achieving an advantage for himself and a disadvantage to competitors. *Eastern Railroad's President's Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961). The rule was recently reaffirmed in *California Motor Transport Co., et al.* v. *Trucking Unlimited*, 92 S.Ct. 609 (decided January 13, 1972). This line of authority only serves to increase the difficulty of the FPC in determining the direction and scope of actions or orders which might be appropriate if investigation of antitrust activity should be undertaken upon remand of this cause.

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ing of the FPC supported by substantial evidence.[20] If the FPC has a duty to consider alleged Sherman Act violations, surely it can be assumed that such duty does not arise in a §204 proceeding if the proposed use of the proceeds of the securities issue do not relate to furtherance of any such violations. In effect, this is what the FPC found in this case. In its order the FPC found:

> (6) the matters asserted and activities alleged in the filed protest and petition to intervene by the Cities of Lafayette and Plaquemine, Louisiana, are irrelevant to the purpose of issuing bonds to refund short-term indebtedness heretofore authorized by this Commission. (App. C, *infra*, at p. 36a.)

Preliminary to this specific finding the FPC addressed itself to the refunding purpose of the bond issue in the body of its order, App. C, at pp. 34a and 35a, the latter part of which was quoted in the opinion of the court below at App. A, p. 10a. Gulf States declared the purpose for which its bonds were to be issued in its verified Application to the FPC (R.,

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[20] Federal Power Act, §313(b), App. G. p. 54a, 55a; *Gainesville Utilities Dept.* v. *Florida Power Corp.*, 402 U.S. 515 (May 24, 1971); *Federal Power Commission* v. *Florida Power & Light Co.*, 92 S.Ct. 637 (January 12, 1972). Even if the quoted finding be treated as dealing with more than a "pure" fact question, it is a finding based on substantial evidence within an area of discretion assigned to FPC for the exercise of its expertise and should not be disturbed by the Court. *Securities and Exchange Commission* v. *New England Electric System*, 390 U.S. 207 (1968); *United States* v. *Drum*, 368 U.S. 370 (1962); *Interstate Commerce Commission* v. *Jersey City*, 322 U.S. 503 (1944); *Securities and Exchange Commission* v. *Central-Illinois Securities Corp.*, 338 U.S. 96, 127 (1949). That there is no dispute concerning the evidentiary facts does not permit Court to substitute its judgment for that of the agency. *Gray* v. *Powell*, 314 U.S. 402, 412 (1941). On undisputed facts, the Court is free to disturb the Commission's finding only if it lacks any rational or statutory foundation. *Securities and Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194, 207 (1947). A reviewing court cannot set aside an inference because it believes an opposite inference to be more reasonable. If supported by evidence and not inconsistent with law, the agency's finding is conclusive. *Cardillo* v. *Liberty Mutual Insurance Co.*, 330 U.S. 469, 477-8 (1947).

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p. 5).[21] Despite this clear evidence of a deliberated finding by the FPC, the Court below said:

> It suffices for present purposes to say that the FPC's terse and cryptic statement did not comply with the requirement we see in *Denver & Rio Grande*, that the agency's reason for denying or deferring hearing of anticompetitive issues be clear on the record, meaningful in findings or discussion. (App. A, *infra*, pp. 21a, 22a).

In summary, if permitted to stand, the opinion of the court below will add to the number of governmental agencies with the responsibility or authority to investigate antitrust law violations or anticompetitive activities and impose upon the FPC and public utilities hereafter seeking its authority for the financing of construction of electric systems (for which the Federal Power Act provides no certificating requirements), the burden, delay, and expense of investigation and examination of matters which are beyond the scope of the FPC's lawful responsibility or regulatory authority. It will also add two more strands to the tangled web of activity in the antitrust field and further compound the confusion by reaching opposite results for the FPC and the SEC under comparable fact situations. These important questions should be settled by this Court. Further, the Court of Appeals should not be permitted to set aside a supported finding of the FPC in a way which conflicts with applicable decisions of this Court.

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[21] Gulf States' statement in full of the purpose for which the securities were to be issued under Item J of its application was: "The proceeds from the sale of the New Bonds will be used by the Company to refund and pay off part of its commercial paper and short-term notes to banks to be outstanding as of the date of issuance. The Company estimates that on December 16, 1970, the date the securities are expected to be sold, there will be outstanding approximately $55,000,000 principal amount of commercial paper and short-term notes issued on various dates. The aforesaid commercial paper and short-term notes to banks constitute an issuance of securities previously authorized by the Commission (Docket No. 4-7509." (R., p. 5.)

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CONCLUSION

For these reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

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March, 1972

APPENDIX A

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 24,764
& 24,963

CITY OF LAFAYETTE, LOUISIANA
CITY OF PLAQUEMINE, LOUISIANA,
Petitioners

v.

SECURITIES AND EXCHANGE COMMISSION,
Respondent
LOUISIANA POWER & LIGHT COMPANY,
Intervenor

No. 71-1041

CITY OF LAFAYETTE, LOUISIANA
CITY OF PLAQUEMINE, LOUISIANA,
Petitioners

v.

FEDERAL POWER COMMISSION,
Respondent
GULF STATES UTILITIES COMPANY,
Intervenor

PETITIONS FOR REVIEW OF ORDERS OF SECURITIES AND EXCHANGE COMMISSION AND FEDERAL POWER COMMISSION

Decided October 12, 1971

Before BAZELON, *Chief Judge*, and FAHY, *Senior Circuit Judge*, and LEVENTHAL, *Circuit Judge*.

LEVENTHAL, *Circuit Judge:* The Cities of Lafayette and Plaquemine, Louisiana ("Cities") petition this court to review orders of the Federal Power Commission and the Securities and Exchange Commission which approved applications, presented to the Securities and Exchange Commission by Louisiana Power and Light Company ("LP&L"), and to the Federal Power Commission by Gulf States Utilities Company, proposing issuance of bonds, notes, and stock to finance capital requirements. The gist of petitioners' complaint is that the agencies failed to take proper account of their claims that the proceeds would be used for the Companies' unlawful conspiracy to suppress competition. We affirm as to the orders of the Securities & Exchange Commission, and remand as to the order of the Federal Power Commission.

I. BACKGROUND

A. *Pertinent Statutes*

The Public Utility Act of 1935, passed August 26, 1935, 49 Stat. 803, contains, in Title I, the Public Utility Holding Company Act, 15 U.S.C. §§ 79 et seq., which provides for regulation of public utility holding companies and is administered by the SEC. Its Title II enacted the Federal Power Act, Parts II and III, 16 U.S.C. §§ 824 et seq. with provisions, for regulation of electric utility companies engaged in interstate commerce, administered by the FPC.

Holding Company Act

Sections 6 and 7 of the Holding Company Act give the SEC jurisdiction over sales of securities by holding companies and their subsidiaries, subject to certain exceptions.

notably an exemption in § 6(b) for issues approved by state commissions.[1]

Section 6 forbids the sale of a security by a holding company or its subsidiary, unless the sale is in accordance with a declaration it has filed under § 7, and with an order of the SEC permitting such declaration to become effective.

Under § 7 the SEC may not permit a declaration to become effective unless it finds compliance with certain requirements. One of these requirements, set forth in § 7(c)(2), is satisfied if the Commission finds "(2) such security is to be issued or sold solely . . . (B) for the purpose of financing the business of the declarant as a public utility company. . . ." If the requirements of §§ 7(c) and (g)[2] are met, § 7(d) requires that the SEC "shall permit a declaration . . . to become effective unless it finds that — . . . (6) the terms and conditions of the issue or sale of the security are detrimental to the public interest or the interest of investors or consumers."

Finally, § 7(f) provides that the Commission's order permitting a declaration to become effective "may contain such terms and conditions as the Commission finds necessary to assure compliance with the conditions specified in this section [7]."

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[1] Section 6 is codified as 15 U.S.C. § 79f. Section 7 is codified as 15 U.S.C. § 79g. Section 6(b) provides that if a particular security issue of a subsidiary has been expressly authorized by the appropriate state utility commission, the SEC shall exempt the issue "subject to such terms and conditions as it deems appropriate in the public interest or for the protection of investors or consumers. . . ."

[2] § 7(g) prohibits a declaration from becoming effective if the Commission has been informed by a State commission having jurisdiction over a company's issuance of securities, or alteration of rights of security holders, that State laws applicable thereto have not been complied with.

Federal Power Act

Section 204 of the Federal Power Act, 16 U.S.C. § 824c, relates to the issuance of a security by a public utility, – defined by § 201 as a company transmitting electric energy in interstate commerce or selling electric energy at wholesale in interstate commerce. Section 204(a) provides that no such public utility shall issue any security except as authorized by FPC order. It continues:

> The Commission shall make such order only if it finds that such issue . . . (a) is for some lawful object, within the corporate purposes of the applicant and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the applicant of service as a public utility and which will not impair its ability to perform that service, and (b) is reasonably necessary or appropriate for such purposes.

Subsection (b) of § 204 gives the Commission broad authorization to place conditions on the granting of an application, and specifically contemplates provisions "as to the particular purposes, uses, and extent to which . . . any security . . . or the proceeds thereof may be applied. . . ."[3]

Subsection (f) of § 204 establishes an exclusion as to a utility organized and operating in a state under the laws of which its security issues are regulated by a State commission.

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[3] "(b) The Commission, after opportunity for hearing, may grant any application under this section in whole or in part, and with such modifications and upon such terms and conditions as it may find necessary or appropriate, and may from time to time, after opportunity for hearing and for good cause shown, make such supplemental orders in the premises as it may find necessary or appropriate, and may by any such supplemental order modify the provisions of any previous order as to the particular purposes, uses, and extent to which, or the conditions under which, any security so theretofore authorized or the proceeds thereof may be applied, subject always to the requirements of subsection (a) of this section."

B. *Petitioners' Antitrust Allegations*

Louisiana Power and Light is a wholly-owned subsidiary of Middle South Utilities, Inc., a holding company registered under the Holding Company Act. It is engaged, as is Gulf States and Central Louisiana Electric Company (CLECO) (the three companies together being sometimes referred to as "Companies"), in generating, transmitting and selling electricity at wholesale and retail in Louisiana. Gulf States also does this in Texas. The three Companies are interconnected, engage in sales and exchanges of electricity among themselves, and are members of the eleven "South Central Electric Companies" which engage in a seasonal exchange of energy with the Tennessee Valley Authority. The Companies are owners in Louisiana of major transmission facilities, handling voltages up to 500 KV.

Petitioners allege that these three Companies engaged in a conspiracy to suppress and defeat an interconnection and pooling agreement between the Cities, Dow Chemical Company and Louisiana Electric Cooperative, Inc. ("LEC"). LEC, a generation and transmission cooperative financed by the Rural Electrification Administration, is made up of twelve electric distribution cooperatives, all of which operate in Louisiana.

In September 1964, the REA undertook to make a $56.5 million loan to LEC for construction of a 200 MW generating station with 1611 miles of transmission lines through which the LEC could serve eight of its twelve member cooperatives. Prior to this time, the three Companies had been selling power to these cooperatives. According to petitioners, the Companies succeeded in delaying the actual use of the funds thus provided for more than five years, through a series of lawsuits filed by the Companies themselves and by the Companies' attorneys on behalf of other putative plaintiffs.

Petitioners allege that in August, 1968, the Cities, Dow and LEC executed an Interconnection and Pooling Agreement providing for the interconnection of their generating systems and a long term pooling and coordination arrangement, with a minimum term of ten years. The agreement, approved by the REA administrator on November 19, 1968, provided for a combined planning of load requirements for the Cities, the LEC members and Dow. It meant, according to petitioners, assurance of a market for all surplus capacity and secondary energy, as well as coordination, and substantial savings, in the construction of new generators, in sum, economies of scale, plus benefits in the form of back-up for each system and energy interchanges.

Petitioners state that by engaging in frivolous and repetitive litigation, and by mounting a public relations drive and lobbying effort against LEC, the three Companies were able to hold up disbursement of the loan money until January, 1969, when a new REA administrator was sworn into office. This prevented the members of the new pool from going ahead with their agreement. Furthermore, a rise in costs during the five-year delay raised a serious question whether the original loan would suffice to finance all of the LEC's generation and transmission needs. Therefore, the new Administrator advanced funds only for the LEC generating station, but not for transmission lines, and LEC was left to negotiate with the three companies for use of their transmission lines.

Petitioners contend that the conspiracy continued during these negotiations. They say that the Companies, while willing to supply transmission of power to some of the LEC members, refused to supply transmission services between pool members. They further say that the Companies demanded that LEC limit its power capacity to the

200 MW already planned, and that the Companies supply all further power needs of the twelve cooperatives, thus precluding further LEC expansion to serve its members' expanding load.

C. *Agency Proceedings*

1. *Securities and Exchange Commission*

Case No. 24,764: On September 16, 1970, LP&L filed with the SEC a declaration for authority to issue and sell $20 million of first mortgage bonds and $7 million in preferred stock. The stated purpose of this financing was to enable LP&L to repay short-term borrowings it had made as temporary financing for its 1970 construction program, and for other corporate purposes.

On October 9, 1970, counsel for the Cities submitted a letter to the Commission, setting forth the allegations outlined above. The Cities asked the Commission to order an investigation of these matters by its staff, to consult with the staff of the FPC, and to withhold action on the authorization pending the results of the investigation or at least a conference with the parties. The Cities contended in their letter that the funds, if approved, would be utilized for the construction of facilities that would assist LP&L and its associates in their unlawful objectives, and asked that such approval, if granted, be conditioned on cessation of these activities and the establishment of a program to remedy the damage already done. The Cities requested that the matter be set down for hearing unless LP&L's parent agreed to such a condition. The Cities also requested a conference with the Commission and the Companies.

On October 27, 1970, the Commission issued its order stating that the Cities had not filed a Notice of Appearance as a party pursuant to Rule 9(a) of its Rules of Practice,

or requested a hearing. The order further stated that "this controversy does not justify withholding of the requested order since it is not relevant to the consideration of the proposed transactions which in all respects satisfy the standards of Section 7."

Case No. 24,963: On November 2, 1970, LP&L filed with the SEC a declaration for authority to issue and sell up to $40 million of short-term notes, during the period through December, 1972. The stated purpose of these borrowings was to finance the construction of new facilities and improvements, and for other corporate purposes.

On November 30, 1970, petitioners filed with the SEC a formal "Protest and Intervention," which contained substantially the same allegations as the October 9 letter, and further requested that the Cities be made parties to the proceeding and that the SEC hold hearings.

On December 29, 1970, the SEC issued its Order permitting the declaration to become effective. The SEC found that the Cities did not directly attack the proposed use of proceeds or the terms and conditions of the proposed securities, but were simply maintaining "that authorization for the proposed financing enhances Louisiana's financial position to pursue the alleged violations of the antitrust laws." The SEC held that its authority under Section 7(d)(6) of the Act, to impose terms and conditions, related solely to the terms and conditions of the security to be issued, and "does not extend to the resolution of collateral and unrelated controversies in which a declarant may be engaged with other parties." The SEC concluded that the allegations in the Protest did not present issues relevant to Section 7 and therefore did not justify withholding the requested Order.

The SEC made findings in each proceeding "that it is appropriate in the public interest and in the interest of

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investors and consumers" that the declaration be permitted to become effective. It permitted both declarations to become effective without a hearing, and the security sales authorized were promptly completed.

2. *Federal Power Commission*

Case No. 71-1041: On October 12, 1970, Gulf States filed an application with the FPC to sell $30 million of first mortgage bonds at competitive bidding. The application stated that the proceeds would be used to pay off part of Gulf States' commercial paper and short-term notes. On October 16, 1970, the FPC noticed the application and announced that protests or petitions to intervene should be filed on or before November 2, 1970.

On November 2, the Cities filed their protest and petition to intervene with the Commission. The protest set forth the allegations outlined above, claiming that Gulf States had violated the antitrust laws, the Federal Power Act, and the Holding Company Act. The Cities requested that the application be set down for hearing unless, as a condition to receiving approval for the sale of its securities, Gulf States would agree to purge itself of these alleged violations and remedy the damage already done.

Following an answer by Gulf States, the Commission, on December 3, 1970, entered an order denying a hearing and authorizing Gulf States to issue the proposed bonds. The Commission stated that the Cities' allegations were "irrelevant to a requested authorization of securities," and further found that:

> The proposed issuance and sale of Bonds, as hereinafter authorized, will be for a lawful object, within the corporate purposes of Applicant and compatible with the public interest, which is appropriate for and consistent with the proper performance by Applicant or

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service as a public utility and which will not impair its ability to perform that service, and is reasonably necessary and appropriate for such purposes.[4]

The FPC refused the Cities' request for a hearing stating:

> The requested approval of the issuance of the Bonds allows the Company only to change the form of a portion of its outstanding indebtedness, it does not call for the initiation of any construction or other program by the Company which might effect [sic] the interest of the Petitioners. The alleged violations which petitioners attempt to raise in this proceeding are irrelevant to a requested authorization of securities. There is no relief that the Commission can order in authorizing the issuance of the Bonds for refinancing purposes that would have any effect on the interest of the Petitioners, or solve any of the problems outlined by them.

In the petition for rehearing, filed December 16, 1970, the Cities argued that the Commission could not have known the purpose for which the bond proceeds would be used, because Gulf States had stated only that they would be added to the Company's general funds, to be used as part of interim funds for construction. Furthermore, the Cities argued, it was unclear whether the Commission considered their antitrust allegations irrelevant to a Section 204 determination generally, or only because, in this particular case, a refunding rather than new funding was involved. The Cities again urged that the Commission condition its approval to assure that the bond proceeds "would not be used to the detriment of the Cities or in a manner inimical to the proposed pool." The Commission denied rehearing, stating that the Cities' grounds for rehearing presented no

[4] By amendment filed December 9, 1970, Gulf States advised the Commission of the terms it proposed to accept in the financing. The Commission approved these terms by an order filed the same day, and again stated that the proposed bonds were for a lawful purpose, and their issuance compatible with the public interest.

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facts or legal principles warranting any change in its orders.

II. PROCEDURAL PROBLEMS

Before proceeding to the substantive issues involved in this case, we note that intervenors LP&L and Gulf States contend petitioners are not properly before this court. Neither the SEC nor the FPC suggest any procedural obstacle to the petitions.

We find no merit in intervenors' procedural contention. LP&L's initial contention[5] is essentially grounded in a claim of failure to exhaust administrative remedies. While the Cities may not have followed SEC procedures to the letter, they made plain their objections and the Commission ruled on the merits. We see no impediment to judicial review. *Joseph* v. *FCC,* 131 U.S.App.D.C. 207, 404 F.2d 207 (1968).

Intervenors contend that the Cities are not aggrieved by the actions of the SEC and FPC, and therefore may not seek judicial review of their orders, either under the review provisions of the particular agency statutes,[6] or under the general review provisions of the Administrative Procedure Act.[7]

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[5] LP&L argues that in case 24,764 Cities failed to file a notice of appearance or formally request a hearing, and this amounted to a failure to urge its objections before the Commission, which precludes judicial review under § 24(a) of the Holding Company Act, 15 U.S.C § 79x(a).

[6] Section 24(a) of the Holding Company Act, 15 U.S.C. § 79x(a) provides judicial review for any "person or party aggrieved by an order issued by the Commission under this title. . . ." Section 313(b) of the Federal Power Act, 16 U.S.C. § 825 1(b) provides judicial review for any "party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding. . . ."

[7] Section 10 of the Administrative Procedure Act, 5 U.S.C. § 702, grants judicial review to a "person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute."

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This contention must be rejected on the authority of *Data Processing Service* v. *Camp*, 397 U.S. 150 (1970), and *Barlow* v. *Collins*, 397 U.S. 159 (1970). The petitioners have alleged injury in fact resulting from the Commission's failure to consider their antitrust contentions relevant. The interest asserted by the petitioners arguably falls within the zone of interests to be protected by the statutes. There is a non-frivolous claim that the "public interest" requirements of these statutes requires consideration of antitrust conspiracy.[8] Even assuming petitioners' contentions should be rejected on the merits, they raised an arguable claim of right under the relevant statutes that establishes procedural standing..

III. VALIDITY OF THE ORDERS

The orders of the FPC and SEC are accompanied by conclusory findings that approval of the applications is in the "public interest." The issue is whether these orders are valid in view of the refusal of these agencies to order a hearing on the allegations of intervening parties of the anti-competitive purpose and consequence of each application and its approval by the Federal agency involved.

The regulatory library includes a host of decisions establishing that when an agency is called upon to determine whether a proposal or condition satisfies the "public interest," or another similar broad standard, the agency has the authority and typically the responsibility to consider a challenge based on the asserted anti-competitive purpose or consequence of the proposal.[9]

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[8] Northern Natural Gas Co. v. FPC, 130 U.S.App.D.C. 220, 319 F.2d 953 (1968); City of Pittsburgh v. FPC, 99 U.S.App.D.C. 113, 237 F.2d 741 (1956).

[9] FMC v Aktiebolaget Svenska Amerika Linien, 390 U.S. 238, 242-246 (1968); Denver & Rio Grande Western R.Co. v. United

This generality is not necessarily conclusive. The same statutory phrase may have different meanings in different contexts, and the statutes, agencies and court decisions are not necessarily fungible. A particular statute may have such a setting that, on consideration of its legislative history, the nature of the agency, and breadth of responsibility involved, and other material factors, a court may come to the conclusion that though its public interest language is broad its meaning in context warrants a relatively restricted reading.[10]

However it is a fair consensus of the cases cited that the nation's profound and pervasive devotion to competition as a fundamental economic policy, and conviction that the public interest is disadvantaged when private enterprises are permitted to engage in anti-competitive agreements and restraints, is applicable at least presumptively even in the case of monopolies or quasi- monopolies characterized by various degrees of government control and protection, subject of course to offset or rebuttal on analysis by the cognizant agency.

With these general observations as a point of departure, we consider the orders and statutes before us.

States, 387 U.S. 485 (1967); United States v. El Paso Natural Gas Co., 376 U.S. 651 (1964); United States v. Philadelphia National Bank, 374 U.S. 321 (1963); California v. FPC, 369 U.S. 482, 484-85 (1962); United States v. Radio Corporation of America, 358 U.S. 334 (1959); McLean Trucking Co. v. United States, 321 U.S. 67 (1944); Marine Space Enclosures, Inc. v. FMC, 137 U.S.App.D.C. 9, 17 ff, 420 F.2d 577, 585 (1969); Municipal Elec. Ass'n of Mass. v. SEC, 134 U.S.App.D.C. 145, 413 F.2d 1052 (1969); Northern Natural Gas Co. v. FPC, 130 U.S.App.D.C. 220, 226, 399 F.2d 953, 959 (1968); City of Pittsburgh v. FPC, 99 U.S.App.D.C. 113, 237 F.2d 741 (1956).

[10] Alabama Electric Cooperative, Inc. v. SEC, 122 U.S.App.D.C. 367, 353 F.2d 905 (1965), *cert. denied*, 383 U.S. 968 (1966); Alabama Electric Cooperative, Inc. v. SEC, 359 F.2d 434 (5th Cir. 1966).

Federal Power Commission Order

Since Gulf States is an electric utility company engaged in interstate commerce, subject to regulation under Title II of the Federal Power Act, its proposal to sell $30 million of first mortgage bonds required an application by the company, and approval by the FPC, under § 204 of the Federal Power Act. Section 204 of the Federal Power Act is almost identical with the pertinent provisions of § 20a of the Interstate Commerce Act, as amended, 49 U.S.C. § 20a, which was recently given an authoritative reading in *Denver & Rio Grande Western R. Co.* v. *United States*, 387 U.S. 485 (1967).

In *Denver & Rio Grande* the Court was concerned with an application of Railway Express Agency to sell shares equal to 20% of its outstanding stock to Greyhound Corporation. On a finding of urgent need the ICC authorized this issuance without a hearing, and deferred decision of contentions presented by objectors that the proposal was not in the "public interest" or for a "lawful object" because it would result in "control" of the applicant by the carrier purchasing the shares, with "anti-competitive" consequences.

The Court rejected the Government's contention "that § 20a was designed to accomplish only the limited objective of protecting stockholders and the public from fiscal manipulation. . . ."[11] The Court held that the ICC had erred in entering its approval while deferring consideration of the anti-competitive effects of the transaction, and remanded to the ICC for further proceedings. It set forth in unmistakable terms the authority and responsibility of the ICC to consider the "anti-competitive" issues. See 387 U.S. at 492:

[11] See 387 U.S. at 491-92.

> We do not agree that Congress limited ICC consideration under § 20a to an inquiry into fiscal manipulation. Even if Congress' primary concern was to prevent such manipulation, the broad terms "public interest" and "lawful object" negate the existence of a mandate to the ICC to close its eyes to facts indicating that the transaction may exceed limitations imposed by other relevant laws. Common sense and sound administrative policy point to the conclusion that such broad statutory standards require at least some degree of consideration of control and anticompetitive consequences when suggested by the circumstances surrounding a particular transaction. Both the ICC and this Court have read terms such as "public interest" broadly, to require consideration of all important consequences including anticompetitive effects.

The FPC observes that in another passage the Court said that the ICC was not required to hold a hearing in every case. That language merits exposition. See 387 U.S. at 498:

> We conclude, therefore, that the ICC is required, as a general rule, under its duty to determine that the proposed transaction is in the "public interest" and for a "lawful object," to consider the control and anticompetitive consequences before approving stock issuances under § 20a(2). This does not mean the ICC must grant a hearing in every case, or that it may never defer consideration of issues which arise when special circumstances are present. But it does mean that, when the ICC exercises its discretion to approve issuances without first considering important control and competition issues, the reviewing court must closely scrutinize its action in light of the ICC's statutory obligations to protect the public interest and to enforce the antitrust laws. Whether or not an abuse of discretion is present must ultimately depend upon the transaction approved, its possible consequences, and any justifications for the deferral.

In this passage the court plainly earmarked the ICC's authority to omit a hearing on anticompetitive issues or to defer consideration thereof in cases presenting special circumstances — as an authority that required agency "justification" and close scrutiny by the reviewing court to assure against any abuse of discretion or default in statutory obligation.

The action of the FPC in the order before us is plainly inconsistent with its duties as developed in *Denver & Rio Grande*. The FPC contends to us that § 204 does not require the FPC to consider antitrust allegations when authorizing the issuance of securities. We are cited to *Pacific Power & Light Co.*, 27 FPC 623 (1962), and urged to show deference to the interpretation given a statute by the agency charged with its administration.[12] In the *Pacific Power & Light* proceeding the FPC was concerned with an application to issue "first mortgage bonds and common stock to use a portion of the proceeds to build a transmission line from Oregon to California at a higher voltage than would be presently required." The FPC noted that it had not been given certificate jurisdiction and "concluded that Section 204 could not be used as a vehicle for 'comprehensive licensing-type regulation . . .' 27 FPC at 626. In the Commission's view, 'the plain purpose of Section 204 was 'to prevent the issuance of securities which might impair the company's financial integrity or its ability to perform its public utility responsibilities.' *Ibid.*"

We are not called upon to review the FPC's decision in *Pacific Power & Light*, or to take account of the points raised in Commissioner Morgan's vigorous dissent. The FPC's 1962 ruling came prior to the Supreme Court's 1967 decision in *Denver & Rio Grande*, a point that merits

[12] Udall v. Tallman, 380 U.S. 1 (1965).

particular emphasis since the FPC itself stressed that § 204(a) was "copied almost verbatim from Section 20a of the Interstate Commerce Act" (27 F.P.C. at 627), and relied on the proposition that the purpose of § 20a was to ensure a sound railroad credit structure.[13] But of course the Court's *Denver and Rio Grande* opinion establishes that while sound financial credit was the dominant objective of § 20a of the Interstate Commerce Act, the breadth of the "public interest" criterion extends to the anticompetitive issues. Thus the FPC's own 1962 reasoning that its law tracks the ICC's statute undercuts the survival of its broad conclusion that § 204(a) is limited to financial matters.[14]

The same may be said for the FPC's conclusion that its authority is necessarily limited since an interstate electric utility may issue short-term notes without FPC authority pursuant to § 204(e) of the Federal Power Act,[15] and could launch its construction with those funds. The same might have been said as to the ICC, which has even less authority over short-term notes than the FPC.[16] The short answer is that a utility would be improvident indeed if it relied on its short-term authority to obviate agency overview on application for approval of the long term securities.

The *Pacific Power & Light* ruling stated that the FPC lacks authority to certificate a utility's operation or expan-

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[13] Citing Sharfman, Interstate Commerce Commission, 190 (N.Y. 1931).

[14] The FPC noted that the Senate Committee "stressed" that control over capitalization is an essential means of safeguarding the public against unsound financial practices, see S. Rep. No. 621, 74th Cong., 1st Sess. (1935) p. 50. But this Senate Report in no way negatives Justice Brennan's comment in *Denver & Rio Grande* that this dominant concern is not exclusive.

[15] Under § 204(e), 16 U.S.C. § 824c(e), the FPC is not given authority as to notes of less than a year's maturity aggregating less than 5% of the company's outstanding securities.

[16] Under § 20a(9) of the Interstate Commerce Act, 49 U.S.C. § 20a(9), the authority of the ICC does not extend to notes of two years or less duration not exceeding 5% of outstanding securities.

sion. This has some weight, but not enough. It would have more if the FPC were in the same position as the SEC, of having no regulatory authority over operations of the utility. But the FPC does have authority over interstate electric utilities, and that authority is by no means insubstantial. As was rightly said in its most recently available annual report, the FPC "exercises national responsibility for the regulation of the interstate electric power industry. . . ."[17]

Apart from regulating interstate electric utilities in regard to their issuance of securities, the FPC is mandated under the Federal Power Act to regulate their charges for the interstate transmission of electric energy (§ 206), and their mergers or consolidations (§ 203).

Significantly the FPC has been given authority and responsibility by § 202 of the Act, 16 U.S.C. § 824a, in regard to interconnection and coordination of facilities.

For the purpose of assuring an abundant supply of electric energy throughout the United States with the greatest possible economy and with regard to the proper utilization and conservation of national resources," § 202(a) directs the FPC "to divide the country into regional districts for the voluntary interconnection and coordination of facilities for the generation, transmission, and sale of electric energy" and pronounced it the "duty of the Commission to promote and encourage such interconnection and coordination within each district and between such districts."

Section 202(b) gives mandatory authority to the FPC, upon application of any State commission or of any person engaged in the transmission or sale of electric energy, to order an interstate electric utility "to establish physical interconnection of its transmission facilities with the facili-

[17] 1970 Annual Report, FPC, p. 24.

ties of one or more other persons engaged in the transmission or sale of electric energy, to sell energy to or exchange energy with such persons." This authority exists if the FPC makes a finding that its exercise is in the public interest, subject only to the proviso that the interconnection not require the regulated utility to enlarge its generating facilities or impair its existing services.

In view of the FPC's broad public interest charter to enhance optimum interconnection and interchange of electric energy, not to mention its array of other activities in furtherance of electric energy capability,[18] the circumstance that its jurisdiction has not been extended to certificating responsibility is no reason for limiting it under § 204 to a tunnel vision of the public interest.

At oral argument the Commission's General Counsel put it that the FPC is interested in safeguarding costs, rates and reliability, but it wants to stay out of the fight between investor-owned utilities on the one hand and cooperatives and municipalities on the other. Whether or not this is tactical wisdom, it may not be achieved at the expense of abdicating responsibility. And we see no reason why the responsibility of considering the public interest requires any jeopardy of the kind of objectivity that is contemplated for an independent regulatory commission.

The Commission is expected to make determinations as to the public interest in matters where there is such underlying conflict. Its docket contains a number of complaints

[18] The 1970 Annual Report discusses, inter alia, its Electric Power Reliability Policy; adoption in pursuance thereof, of "a system of comprehensive reporting by all segments of the electric power industry (private, public, cooperative and Federal) of information on operating data and advance planning by power pools, coordinating groups, and individual utilities and on studies to support such plans"; its 1970 National Power Survey; and the work of its Task Force on Environment.

appropriately referred to as supple and flexible.[28] The doctrine of primary jurisdiction "has become one of the key judicial switches" in furtherance of "coordination between judicial machinery and [administrative] agencies" in matters of mutual concern.[29] Switches operate both ways, and, depending on the nature of the issue, an agency may wait for a court as well as the reverse.

We have been at pains to set forth the latitude available to the agency in approach and procedure to obviate any concern that this court seeks to interfere with its exercise of discretion. What the court does require is that the agency take a "hard look" at problem areas.[30]

Securities and Exchange Commission

Section 7(d)(6) of the Holding Company Act is not written in the same terms as § 204 of the Federal Power Act. The SEC, in holding petitioners' antitrust allegations irrelevant to its determination, and refusing to set the matter down for hearing, stated:[31]

> The phrase "terms and conditions" as here used relates solely to the terms and conditions of the security to be issued, and therefore, the phrase "detrimental to the public interest" refers to such terms and conditions and not to extraneous matters. Section 7(f) provides that "any order permitting a declaration to become effective may contain such terms and conditions as the

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[28] J.M. Huber Corp. v. Denman, 367 F.2d 104, 111 (5th Cir. 1966).

[29] Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic, 400 U.S. 62, 68-69 (1970); Brawner Building, Inc. v. Shehyn, —— U.S.App.D.C. ——, 442 F.2d 847 (1971). *Compare* United States v. Morgan, 307 U.S. 183, 191 (1939).

[30] Greater Boston Television Corp. v. FCC, —— U.S.App.D.C. ——, —— F.2d —— (slip opinion at p. 18) (Nov. 13, 1970), *cert. denied*, 403 U.S. 923 (June 14, 1971); WAIT Radio v. FCC, 135 U.S.App.D.C. 317, 418 F.2d 1153 (1969).

[31] JA 160, Holding Company Act Release No. 16955.

Commission finds necessary to assure compliance with the conditions specified in this section." Authorization to impose terms and conditions under Section 7(f) does not extend to the resolution of collateral and unrelated controversies in which a declarant may be engaged with other parties. See *Alabama Power Co.*, (Holding Company Act Release No. 15252, June 1, 1965), *affirmed*, *Alabama Electric Cooperative, Inc.* v. *SEC*, 353 F.2d 905 (1965), *cert. denied*, 383 U.S. 968.

We turn first to the precedent cited by the SEC. In *Alabama Electric Cooperative* v. *SEC*, 122 U.S.App.D.C. 367, 353 F.2d 905 (1965), Alabama Power, seeking to issue $14 million of common stock, claimed an exemption from SEC supervision under § 6(b) of the Holding Company Act, on the ground that the issue was subject to regulation by a state commission. The Cooperative objected that the holding company intended to use the proceeds of this sale so as to duplicate its lines and facilities, and asked the SEC to prevent such use, through its power to impose conditions on an exemption "in the public interest or for the protection of investors or consumers." When the SEC refused, the Cooperative argued it had erred in refusing to consider the claim of anti-competitive effect. We affirmed the Commission, saying (122 U.S.App.D.C. at 369, 353 F.2d at 907):

> The purpose of the Public Utility Holding Company Act . . . was to supplement state regulation—not to supplant it. Nowhere in the Act is there a provision granting to the SEC the sort of regulatory power attributed to it by the petitioner. Indeed, the congressional choice of that Commission to administer the Act is, in itself, the strongest sort of proof that the general purpose of the Act was to regulate the issuance of securities which could not be reached by state commissions.

In *Municipal Electric Ass'n of Massachusetts* v. *SEC*, 134 U.S.App.D.C. 145, 413 F.2d 1052 (1969), however, this court required the SEC to consider anti-competitive effects.

comply with the requirement we see in *Denver & Rio Grande,* that the agency's reason for denying or deferring hearing of anticompetitive issues be clear on the record, meaningful in findings or discussion.

Accordingly we deem it necessary to remand the order under review. To avoid misunderstanding, we think it appropriate to say expressly that an agency is not required to hold hearings in matters where the ultimate decision will not be enhanced or assisted by the receipt of evidence.[23] And as to interventions raising anti-competitive issues we see no objection in law to a disposition without hearing that is accompanied by an explanation, supported in the record, that the intervenor's contentions are too insubstantial or barren to indicate the existence of substantial anticompetitive issues, or to meet the requirement of a reasonable nexus between the activities challenged and the activities furthered by the application.[24]

We do not undertake to determine now what is involved in the requirement of reasonable nexus, which we think is fairly implied in the jurisprudence. Development of this requirement must await consideration in the first instance by the agency involved, and an analysis of the factual context.

We are aware, too, of the pertinence of the comment of FPC's counsel, that security issues to provide funds for a utility's construction must be decided in a time frame much more limited than that often contemplated for anti-

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[23] Denver Union Stock Yard Co. v. Producers Livestock Marketing Ass'n. 356 U.S. 282, 287 (1958); Citizens for Allegan County Inc. v. FPC, 134 U.S.App.D.C. 229, 414 F.2d 1125 (1969).

[24] In Municipal Elec. Ass'n of Mass. v. SEC, 134 U.S.App.D.C. 145, 152, 413 F.2d 1052, 1059 (1969), the court noted that the control challenged by the cities "is tied in significant manner to the acquisition of the stock" for which approval was sought.

trust litigation. But the doctrine of public interest consideration does not contemplate that an agency will be engaged in a determination of antitrust issues as such.[25]

In the context of a particular matter, it may become evident that the agency may approve forthwith a large portion of the application, and the use of the funds contemplated thereby, while reserving decision on the difficult issue. Indeed even an entire application may be approved if the agency stands ready to proceed with hearing and consideration of the anticompetitive issues, and to take the problems into account in the disposition of another application projected for presentation to the agency within a reasonable time.[26]

So far as antitrust issues are concerned the agency has the opportunity to obtain the comments of the Department of Justice.[27] It may even, indeed, defer its disposition pending determination of relevant court litigation where that will aid in the determination of the "public interest" issue. This would be in effect a reverse application of the doctrine of primary jurisdiction, a doctrine that has been

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[25] Northern Natural Gas Co. v. FPC, *supra*, note 9, 130 U.S.App. D.C. at 229-30, F.2d at 962-63.

[26] Even in courts the doctrine of mootness does not apply to questions of a recurring nature. Southern Pacific Terminal Co. v. ICC, 219 U.S. 498 (1911); Friend v. United States, 128 U.S.App. D.C. 323, 388 F.2d 579 (1967).

[27] Northern Natural Gas Co. v. FPC, *supra*, 130 U.S.App.D.C. at 227, 399 F.2d at 960. Intervenor observes that § 314(a) of the Federal Power Act does not set for a duty in the FPC to report antitrust violations to the Attorney General such as appeared in § 20(a) of the Natural Gas Act of 1938. If this is more than an accident of drafting style, perhaps marking the change between 1935 and 1938, it does not limit the authority of the agency either to refer matters to the Attorney General or to entertain his presentations.

by public utilities and by cooperatives against private companies, both for physical interconnection and for termination of charges attacked as discriminatory or otherwise unlawful.[19] It is illuminating that only recently the Supreme Court sustained an FPC interconnection order that rejected the claim of a private utility to make an interconnection with a municipally-owned utility on terms more onerous than those required of other investor-owned utilities.[20]

Replacement of Short-Term Notes

The FPC's counsel vigorously urged an alternative contention, that the Cities' intervention did not require a hearing since their allegations concerning Gulf States' operations could have no meaningful relation to an application that only sought to replace short-term notes with long-term bonds.

This contention is not without appeal, and also not without problems. First, the order giving Gulf States authority to issue $30 million bonds to replace short term notes apparently operated to give Gulf States authority to increase its overall debt, since it would have had authority forthwith to issue an additional $30 million in short-term notes.[21] It is not clear whether FPC counsel would have urged

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[19] Annual Report for 1970, Table 10, p. 26.

[20] Gainesville Utilities Department et al v. Florida Power Corp., 402 U.S. 515 (1971). The FPC rejected the claim of Florida Power Co. that the city system pay not only the capital cost of the interconnection but also an annual payment for the backup service. It noted among other matters that Florida Power had not included a comparable charge in any of the contracts for interconnection voluntarily negotiated with members of the Florida Operating Committee, an informal group coordinating the technical operations of five Florida utilities.

[21] Its previously granted authority to issue $80 million short term notes would not have been terminated, though the duration of the notes authorized would have been reduced by the lapse of time.

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the same contention if the outstanding short-term notes had been of one year's duration and had been issued by Gulf States, pursuant to § 204(e) of the Act, on its own authority and without an FPC order. A contention this broadly put would raise most serious questions.

The ultimate reason, however, for rejecting this contention of FPC counsel is that the cryptic statement of the FPC does not permit us to conclude with reasonable confidence that this was the position taken by the FPC. And we cannot permit arguments of counsel to take the place of agency findings.[22]

Our problem is not a merely technical one. The point here urged by counsel has significance only on the assumption that at another time the FPC would consider the anti-competitive issues as material. But that assumption means a modification or restriction of the FPC's 1962 ruling in *Pacific Power & Light, supra.* We have no guidance from the FPC that it accepted a limitation of that ruling. Indeed we have been asked to affirm its order on the reasoning of that 1962 ruling. Moreover when the Cities, in their petition for rehearing, expressly requested the FPC to advise whether the reason for denial of a hearing was the nature of the application as seeking approval for long-term bonds on a refunding of short-term notes, the FPC declined to say this.

We do not consider what ruling we would make on the basis of such a position if thought through and embodied in FPC policy and findings. It suffices for present purposes to say that the FPC's terse and cryptic statement did not

[22] Burlington Truck Lines, Inc. v. United States, 371 U.S. 156 (1962); Public Serv. Comm. of the State of New York v. FCC, — U.S.App.D.C. —, 436 F.2d 904 (1970); WAIT Radio v. FCC, 135 U.S.App.D.C. 317, 418 F.2d 1153 (1969); Braniff Airways, Inc. v. CAB, 126 U.S.App.D.C. 399, 379 F.2d 453 (1967).

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That case involved an application by several New England electric utilities, under § 10 of the Holding Company Act, 15 U.S.C. § 79j, to approve their acquiring the stock of two nuclear-power electric generating companies. The Municipals sought a hearing on their charge that any approval of the acquisition, to the exclusion of the Municipals' opportunity to obtain power directly from the nuclear-power plants, would not be in the public or consumer interest, since it would deprive the Municipals of access to a course of cheap power and thus harm them competitively. The SEC denied the request for a hearing, holding that the Municipals had presented no issue of fact relevant to the proceedings. We reversed, and remanded for a hearing before the SEC concerning the imposition of appropriate conditions on the transaction.

Petitioners claim that both our action and opinion in *Municipal* establish the necessity of considering antitrust allegations before granting approvals to stock issues under §§ 6 and 7. However, the *Municipal* opinion expressly asserts that a line, albeit a "fine line," is to be drawn between SEC's approval of an acquisition of stock by a utility, and a sale of securities by a utility. Acquisitions are governed by §§ 9 and 10 of the Holding Company Act. Our *Municipal* opinion pointed out that § 10, unlike § 7, expressly prohibits approval of a transaction if the Commission finds that it will tend toward interlocking relations or the concentration of control of public-utility companies, of a kind or to an extent detrimental to the public interest or the interest of investors or consumers.

The *Alabama Cooperative* case is not to be read as limiting SEC's consideration under § 7(d)(6) solely to reviewing the financial terms of the security to be issued. The force of that 1965 opinion is weakened, apart from the 1967 opinion in *Denver & Rio Grande*, by its erroneous assump-

tion of the narrow reading to be given to § 10, an assumption undercut by our 1969 opinion in *Municipal*. Moreover, *Alabama Cooperative* did not involve an SEC approval in the course of exercising its jurisdiction under §§ 6 and 7, but the question whether it could impose terms to qualify the exemption provided by § 6(d) for security issues approved by a state commission. In *Municipal Elec. Ass'n of Mass* v. *SEC*, 136 U.S.App.D.C. 175, 419 F.2d 757 (1969), we specifically reserved the issue of whether antitrust considerations are included in the public interest referred to in approvals of §§ 6 and 7.

We think proper resolution of the problem now before us is provided by affirmance of the SEC's order, but with modification in part of our discussion in *Alabama Cooperative*. Where an agency has some regulatory jurisdiction over operations, it must consider whether there is a reasonable nexus between the matters subject to its surveillance and those under attack on anti-competitive grounds. But the general doctrine requiring an agency to take account of antitrust considerations does not extend to a case like the one before us where the antitrust problem arises out of operations of the regulated company (past and projected) and the agency, here the SEC, has not been given any regulatory jurisdiction over operations of the company. The SEC has no jurisdiction over operations and stands in a different posture from the FPC which, as we have already noted, has regulatory jurisdiction over operations in view of its authority, *inter alia*, to direct utilities to interconnect on reasonable terms, or to prohibit a utility from discriminating in rates and facilities against its municipal customers.

In *Municipals* the utility's acquisition of stock was subject to SEC jurisdiction. And the court held that the exercise of the authority to approve acquisitions requires

consideration of antitrust matters, particularly in view of the statutory purpose to avoid undue concentration of control in public utility holding companies. This is a more static issue than direct surveillance of operations. It is rather a review of proposed structure to ascertain whether it embraces a substantial possibility of undue concentration of control. Of course a decision on structure requires "economic forecasting" concerning operations, in such matters as *e.g.*, profitability, consequence of independence of management. *SEC* v. *New England Elec. System*, 390 U.S. 207, 211, *et seq.* (1968). Yet although the matters are interrelated, the SEC's jurisdiction relates to structure rather than directly to operations.

To avoid misunderstanding, we are not here accepting the contention of SEC counsel that the distinction lies between application under § 10 for acquisition, which requires consideration of antitrust issues, and applications under § 6 for approval of security issues, which do not. As to applications under § 6 the question left open by second *Municipals* is still open. So far as this opinion is concerned the court will be free to determine, if the circumstances warrant, that the application under § 6 requires consideration of antitrust issues because the purpose of the application is significantly related to the structural position of the applicant in the industry — perhaps by a proposal for operating affiliation as well as one for capital affiliation — which presents the kind of issue, of undue concentration of control, that lies within the regulatory jurisdiction of SEC upon consideration of an application under § 10.

There may also be circumstances where a particular proposed operating use of funds will, it is claimed, be linked significantly to operations within the SEC surveillance contemplated by Congress. Suppose it were objected that the utility planned a covert use of a significant part of the

proceeds of a security issue to establish a political slush fund prohibited by § 12(h) of the Holding Company Act. We think the SEC would be under a duty to give consideration to the claim, for the matter challenged is within the reasonable contemplation of Congress as one in which the SEC has a sphere of interest, and should explore further when the issue is brought to its attention.

Addressing ourselves broadly, however, to the question of sale of securities, and taking into account the regulatory volumes involved[32] and the lack of any SEC authority to regulate operations of utilities, we think an objecting intervenor cannot require SEC consideration of the applicant's operating activities from the point of view of undue restraints on competitors or potential competitors. We state this doctrine in terms of broad application rather than in categorical terms, for we leave open the resolution appropriate if in a particular case the operations assailed are of such a nature as to be equivalent, in significance and consequence, to structural affiliation, or if the purpose of the utility's sale of securities is otherwise shown to have a reasonable nexus to matters within the SEC's jurisdiction under other provisions. Within the broad reach of the doctrine we deem applicable we do not think petitioners have made a showing of reversible error.

In Nos. 24,764 and 24,963, the orders of the SEC are affirmed. In No. 71-1041, the cause is remanded to the FPC for further proceedings not inconsistent with this opinion.

So ordered.

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[32] In fiscal 1970, 15 active registered bidding companies and their subsidiaries sold 59 issues, pursuant to SEC authorization, and raised new capital in the amount of $1,684,000,000. SEC 36th Ann. Report (for 1970) p. 164.

APPENDIX B

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1971

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

FILED Oct. 12, 1971

/s/ Nathan J. Paulson

Clerk

No. 71-1041

CITY OF LAFAYETTE, LOUISIANA
CITY OF PLAQUEMINE, LOUISIANA,

Petitioners

v.

FEDERAL POWER COMMISSION,

Respondent

GULF STATES UTILITIES COMPANY,

Intervenor

Petition for Review of Order of the Federal Power Commission

Before: BAZELON, *Chief Judge; and* FAHY, *Senior Circuit Judge, and* LEVENTHAL, *Circuit Judge.*

JUDGMENT

This case came on to be heard on the record from the Federal Power Commission, and was argued by counsel. Respondent thereafter filed a supplemental memorandum. On consideration of the foregoing, it is

ORDERED AND ADJUDGED by this Court that this case is hereby remanded to the Federal Power Commission for further proceedings consistent with the opinion of this Court filed herein this date.

Per Curiam
For the Court:

/s/ NATHAN J. PAULSON
NATHAN J. PAULSON
Clerk

APPENDIX C

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1971

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

FILED Dec. 15, 1971

/s/ Nathan J. Paulson
Clerk

No. 71-1041

CITY OF LAFAYETTE, LOUISIANA
CITY OF PLAQUEMINE, LOUISIANA,
Petitioners

v.

FEDERAL POWER COMMISSION,
Respondent

GULF STATES UTILITIES COMPANY,
Intervenor

Before: BAZELON, *Chief Judge;* FAHY, *Senior Circuit Judge and* LEVENTHAL, *Circuit Judge.*

ORDER

On consideration of intervenor's petition for rehearing on petition to review an order of the Federal Power Commission, it is

ORDERED by the Court that intervenor's aforesaid petition is denied.

Per Curiam

For the Court:

/s/ NATHAN J. PAULSON
NATHAN J. PAULSON
Clerk

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APPENDIX D

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners:
John N. Nassikas, *Chairman;* Lawrence J. O'Connor, Jr., Carl E. Bagge, John A. Carver, Jr., and Albert E. Brooke, Jr.

GULF STATES UTILITIES COMPANY,
Docket No. E-7567

ORDER AUTHORIZING ISSUANCE OF FIRST MORTGAGE BONDS, GRANTING INTERVENTION AND DENYING HEARING

(Issued December 3, 1970)

Gulf States Utilities Company (Applicant), a corporation organized under the laws of the State of Texas and doing business in the States of Texas and Louisiana, filed an application on October 12, 1970, seeking an order pursuant to Section 204 of the Federal Power Act authorizing it to issue and sell at competitive bidding, $30,000,000 aggregate principal amount of First Mortgage Bonds, due 2000.

The Applicant proposes to issue the Bonds under their Indenture of Mortgage to Manufacturers Hanover Trust Company, dated September 1, 1926, as supplemented and proposed to be further supplemented by a Twenty-ninth Supplemental Indenture dated as of the date of the new Bonds.

Applicant originally proposed to publish bids for purchase of the Bonds on November 24, 1970, and to accept a bid on December 9, 1970. The proposed publication of bids can be delayed for one-week and still allow the Applicant to meet the date set for bid acceptance.

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Each bid must be presented by a single bidder or by a group of bidders to the Company at Manufacturers Hanover Trust Company, the Federal Room, Fourth Floor, 40 Wall Street, New York, New York 10015, before 11:00 A.M. New York Time, on December 9, 1970.

Each bid shall specify, among other things, (1) the interest rate of the Bonds, which shall be a multiple of ⅛%; (2) the price (expressed as a percentage of the principle amount), exclusive of accrued interest, to be paid to the Company for the Bonds, which shall not be less than 99% and not more than 102½% of the principle amount of the Bonds, and that accrued interest on the Bonds from the first day of the month in which the Bonds are issued to the date of payment therefor and delivery thereof will be paid to the Company by the Purchaser or Purchasers.

The proceeds to be realized from the sale and issuance of the proposed Bonds will be used by the Company to refund and pay off part of its commercial paper and short-term notes to banks to be outstanding as of the date of issuance. The Company estimates that on December 16, 1970, the date the securities are expected to be sold, there will be outstanding approximately $55 million principal amount of commercial paper and short-term notes issued on various dates. The short-term indebtedness of the Company was authorized by the Commission in Docket No. E-7509 and the proceeds from the notes were expended in connection with the Company's construction program and for other corporate purposes. The cost of new construction is expected to total $110 million in 1970 and $93 million in 1971.

Written notice of the application has been given to the Texas Railroad Commission, the Louisiana Public Service Commission, and to the Governor of each of those States.

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Notice has also been given by publication in the Federal Register on October 27, 1970 (35 F.R. 16649), stating that any person desiring to be heard or to make any protest with reference to the application should on or before November 2, 1970, file a petition or protest with the Federal Power Commission, Washington, D. C. 20426.

On November 2, 1970, the Cities of Lafayette and Plaquemine, Louisiana, filed a protest and petition to intervene in the proceeding requesting that the Commission withhold the order authorizing the issuance of the proposed Bonds and that the proceeding be set for hearing. Intervenors allege that activities of the applicant violate Federal anti-trust laws, Section 10(h) of the Federal Power Act, and the Public Utility Holding Company Act of 1935. All violations arising from Applicant's activities allegedly prevented construction of generating facilities by certain utilities in Louisiana and power pooling arrangements in which the cities are to participate.

On November 12, 1970, the Applicant answered the protest and petition to intervene denying violations of the anti-trust laws, the Federal Power Act, or the Public Utility Holding Company Act of 1935, and contending, among other things that the Cities lack standing to intervene, in that they have not alleged any interest which may be affected, or as to which they will be bound by Commission authorization of the proposed Bond application.

The requested approval of the issuance of the Bonds allow the Company only to change the form of a portion of its outstanding indebtedness, it does not call for the initiation of any construction or other program by the Company which might effect the interest of the Petitioners. The alleged violations which petitioners attempt to raise in this proceeding are irrelevant to a requested authorization of

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securities. There is no relief that the Commission can order in authorizing the issuance of the Bonds for refinancing purposes that would have any effect on the interest of the Petitioners, or solve any of the problems outlined by them.

The Commission finds:

(1) The Applicant, a corporation, is a public utility within the meaning of Section 204 of the Federal Power Act subject to the jurisdiction of the Commission as heretofore determined and set forth in the Commission's order issued *November 27, 1957, In the Matter of Gulf States Utilities Company,* Docket No. E-6785 (18 FPC 701).

(2) The proposed issuance and sale of Bonds, as described above will constitute an issuance of securities within the purview of Section 204 of the Act.

(3) Applicant is not organized and operating in a State under the laws of which the security issue here involved is regulated by a State Commission within the meaning of Section 204(f) of the Act; and the proposed issuance of securities is, therefore, not exempt by virtue of that Section from the requirement of Section 204 of the Act.

(4) The proposed issuance and sale of Bonds, as hereinafter authorized, will be for a lawful object, within the corporate purposes of Applicant and compatible with the public interest, which is appropriate for and consistent with the proper performance by Applicant or service as a public utility and which will not impair its ability to perform that service, and is reasonably necessary and appropriate for such purposes.

(5) Intervention by the above-mentioned petitioners may be in the public interest for purposes of Commission consideration of their petition.

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(6) The matters asserted and activities alleged in the filed protest and petition to intervene by the Cities of Lafayette and Plaquemine, Louisiana, are irrelevant to the purpose of issuing bonds to refund short-term indebtedness heretofore authorized by this Commission.

(7) The matters asserted and activities alleged in the filed protest and petition to intervene by the Cities of Lafayette and Plaquemine, Louisiana, do not raise any issue which requires a hearing.

The Commission orders:

(A) The above-mentioned petitioners are hereby permitted to intervene in this proceeding subject to the rules and regulations of the Commission. *Provided, however,* That the admission of the afore-mentioned petitioner's shall not be construed as recognition by the Commission that the petitioners might be aggrieved because of any order or orders of the Commission entered in this proceeding.

(B) The above-mentioned petitioners request for hearing is denied.

(C) The proposed issuance and sale of Bonds upon the terms and conditions and for the purposes specified in the application as described above, is hereby authorized, subject to the provisions of this order.

(D) The proposed issuance and sale of Bonds at competitive bidding shall not be consummated until:

(i) Applicant shall have amended its application pursuant to the requirements of Section 34.2(g) of the Commission's Regulations under the Federal Power Act relating to compliance with competitive bidding requirements, and Section 34.2(h) of those Regulations relating to affiliation, and shall have either filed such amendments or shall have mailed them and advised

the Commission by telephone and telegraph, as contemplated in Section 34.9 of the Regulations;

(ii) The Commission, by a further order, shall have approved the price to be received by Applicant for the proposed issuance of Bonds and the interest rate thereof.

(E) This authorization shall expire unless the transactions hereby authorized are consummated within 90 days from the date of issuance of this order.

(F) The foregoing authorization is without prejudice to the authority of the Commission or any other regulatory body with respect to rates, service, accounts, valuation, estimates or determinations of cost, or any other matter whatsoever now pending or which may come before this Commission.

(G) Nothing in this order shall be construed to imply any guarantee or obligation on the part of the United States with respect to any securities to which this order relates.

By the Commission.

(SEAL)

Gordon M. Grant,
Secretary.

APPENDIX E

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: John N. Nassikas, Chairman;
Carl E. Bagge, and Albert B. Brooke, Jr.

Gulf States Utilities Company Docket No. E-7567

SUPPLEMENTAL ORDER AUTHORIZING ISSUANCE OF FIRST MORTGAGE BONDS

(Issued December 9, 1970)

By order issued December 3, 1970, in the above-entitled matter, the Commission authorized Gulf States Utility Company (Applicant), to issue and sell at competitive bidding $30,000,000 principal amount of First Mortgage Bonds subject, among others, to the provisions set forth in paragraph (D) of that order, as follows:

(D) The proposed issuance and sale of Bonds at competitive bidding shall not be consummated until:

(i) Applicant shall have amended its application pursuant to the requirements of Section 34.2(g) of the Commission's Regulations under the Federal Power Act relating to compliance with competitive bidding requirements, and Section 34.2(h) of those Regulations relating to affiliation, and shall have either filed such amendments or shall have mailed them and advised the Commission by telephone and telegraph, as contemplated in Section 34.9 of the Regulations;

(ii) The Commission, by a further order, shall have approved the price to be received by Applicant for the proposed issuance of Bonds and the interest rate thereof.

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Applicant, on December 9, 1970, filed an amendment, pursuant to the requirements of the afore-mentioned Commission order, in which it states, among other things that it proposes to accept, as representing the lowest cost of money to be paid by the Applicant to the underwriters, the bid of The First Boston Corporation, Salomon Brothers and Eastman Dillon, Union Securities & Co. Underwriters to purchase the proposed $30,000,000 issue of First Mortgage Bonds carrying a coupon rate of 7⅞% at a price to the Company of $99.42% of principal amount. Based upon an initial public offering price of 100.286% of principal amount, the yield will be 7.85% and the Company's cost of money will be 7.9259%.

The Commission finds:

(1) Applicant has satisfactorily complied with the requirements contained in paragraph (D) of the Commission's order issued December 3, 1970, in the above-entitled Docket; and the competitive bid it proposes to accept for the Bonds and the interest rate thereof are reasonable.

(2) The proposed issuance and sale of Bonds as hereinafter authorized, will be for a lawful object, within the corporate purposes of Applicant and compatible with the public interest, which is appropriate for and consistent with the proper performance of service by Applicant as a public utility and which will not impair its ability to perform that service, and is reasonably appropriate for such purposes.

The Commission orders:

(A) The price to be received by Applicant for the proposed Bonds and the interest rate thereof, are approved as reasonable.

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(B) The proposed issuance and sale of Bonds referred to above, upon the terms and conditions, and for the purposes specified in the application, as supplemented by the amendment referred to above, are hereby authorized, subject only to the provisions of paragraph (E), (F) and (G) and of the Commission's order issued December 3, 1970, in the above docket.

By the Commission.

(S E A L)

Gordon M. Grant,
Secretary.

APPENDIX F

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners:
John N. Nassikas, *Chairman;* Lawrence J. O'Connor, Jr., John A. Carver, Jr., and Albert B. Brooker, Jr.

GULF STATES UTILITIES COMPANY
Docket No. E-7567

ORDER DENYING APPLICATION FOR HEARING

(Issued January 13, 1971)

By order issued December 3, 1970, the Commission authorized Gulf States Utilities Company (Applicant) to issue $30,000,000 principal amount of First Mortgage Bonds, due 2000, subject, however, to further Commission approval of the price of the Bonds to be paid to the Applicant and the interest rate of the Bonds. The Commission also granted leave to intervene to the Cities of Lafayette and Plaquemine, Louisiana, based upon their protest and petition to intervene filed November 2, 1970; Hearing in the proceeding was denied.

By supplemental order issued December 9, 1970, the Commission approved the price of the Bonds and the interest rate thereof, thereby authorizing the immediate issuance of the Bonds.

Intervenors on December 16, 1970, filed in this proceeding an application for rehearing of the Commission's orders of December 3, 1970 and December 9, 1970, seeking withdrawal of those orders, setting the case for full hearing, and directing Commission Staff to pursue an investigation of Applicant's activities. In their application for rehearing, Intervenors incorporate all grounds raised in their original

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petition to intervene as previously considered by the Commission. In addition, Intervenors present the further argument that the Applicant's described use of the funds authorized in Docket No. E-7567 and Docket No. E-7509, as set forth in the applications, are not sufficient to support the Commission's findings that the issuance of Bonds is for a "lawful object . . . compatible with the proper performance by (Gulf States of) service as a public utility. . ."

The Commission finds:

The grounds for rehearing set forth in the application filed on December 16, 1970, by the Cities of Lafayette and Plaquemine, Louisiana in Docket No. E-7567 present no facts or legal principles which would warrant any change in or modification of the aforementioned Commission orders issued December 3, 1970 and December 9, 1970.

The Commission orders:

The application for rehearing filed by the Cities of Lafayette and Plaquemine, Louisiana on December 16, 1970, in Docket No. E-7567 is denied.

By the Commission.

(SEAL)

Gordon M. Grant,
Secretary.

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APPENDIX G

FEDERAL POWER ACT
TITLE 16 USCA

SUBCHAPTER II.—REGULATIONS OF ELECTRIC UTILITY COMPANIES ENGAGED IN INTERSTATE COMMERCE

§ 824. Declaration of policy; application of subchapter; definitions

(a) It is declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in sections 824-825r of this title and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States.

(b) The provisions of sections 824-824h of this title shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in said sections, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate

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commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter.

(c) For the purpose of sections 824-824h of this title, electric energy shall be held to be transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof; but only insofar as such transmission takes place within the United States.

(d) The term "sale of electric energy at wholesale" when used in sections 824-824h of this title, means a sale of electric energy to any person for resale.

(e) The term "public utility" when used in sections 824-825r of this title means any person who owns or operates facilities subject to the jurisdiction of the Commission under sections 824-824h of this title.

(f) No provision in sections 824-824h of this title shall apply to, or be deemed to include, the United States, a State or any political subdivision of a State, or any agency, authority, or instrumentality of any one or more of the foregoing, or any corporation which is wholly owned, directly or indirectly, by any one or more of the foregoing or any officer, agent, or employee of any of the foregoing acting as such in the course of his official duty, unless such provision makes specific reference thereto. June 10, 1920, c. 285, § 201, as added Aug. 26, 1935, c. 687, Title II, § 213, 49 Stat. 847.

§ 824a. Interconnection and coordination of facilities; emergencies; transmission to foreign countries—Regional districts; establishment; notice to State commissions

(a) For the purpose of assuring an abundant supply of electric energy throughout the United States with the greatest possible economy and with regard to the proper

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utilization and conservation of natural resources, the Commission is empowered and directed to divide the country into regional districts for the voluntary interconnection and coordination of facilities for the generation, transmission, and sale of electric energy, and it may at any time thereafter, upon its own motion or upon application, make such modifications thereof as in its judgment will promote the public interest. Each such district shall embrace an area which, in the judgment of the Commission, can economically be served by such interconnected and coordinated electric facilities. It shall be the duty of the Commission to promote and encourage such interconnection and coordination within each such district and between such districts. Before establishing any such district and fixing or modifying the boundaries thereof the Commission shall give notice to the State Commission of each State situated wholly or in part within such district, and shall afford each such State commission reasonable opportunity to present its views and recommendations, and shall receive and consider such views and recommendations.

Sale or exchange of energy; establishing physical connections

(b) Whenever the Commission, upon application of any State commission or of any person engaged in the transmission or sale of electric energy, and after notice to each State commission and public utility affected and after opportunity for hearing, finds such action necessary or appropriate in the public interest it may by order direct a public utility (if the Commission finds that no undue burden will be placed upon such public utility thereby) to establish physical connection of its transmission facilities with the facilities of one or more other persons engaged in the transmission or sale of electric energy, to sell energy to or exchange energy with such persons: *Provided*, That the Commission shall have no authority to compel the enlargement of generating facilities for such purposes, nor to compel

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such public utility to sell or exchange energy when to do so would impair its ability to render adequate service to its customers. The Commission may prescribe the terms and conditions of the arrangement to be made between the persons affected by any such order, including the apportionment of cost between them and the compensation or reimbursement reasonably due to any of them. (§202)

§ 824b. Disposition of property; consolidations; purchase of securities

(a) No public utility shall sell, lease, or otherwise dispose of the whole of its facilities subject to the jurisdiction of the Commission, or any part thereof of a value in excess of $50,000, or by any means whatsoever, directly or indirectly, merge or consolidate such facilities or any part thereof with those of any other person, or purchase, acquire, or take any security of any other public utility, without first having secured an order of the Commission authorizing it to do so. Upon application for such approval the Commission shall give reasonable notice in writing to the Governor and State commission of each of the States in which the physical property affected, or any part thereof, is situated, and to such other persons as it may deem advisable. After notice and opportunity for hearing, if the Commission finds that the proposed disposition, consolidation, acquisition, or control will be consistent with the public interest, it shall approve the same.

(b) The Commission may grant any application for an order under this section in whole or in part and upon such terms and conditions as it finds necessary or appropriate to secure the maintenance of adequate service and the coordination in the public interest of facilities subject to the jurisdiction of the Commission. The Commission may from time to time for good cause shown make such orders supple-

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mental to any order made under this section as it may find necessary or appropriate. June 10, 1920, c. 285, § 203, as added Aug. 26, 1935, c. 687, Title II, § 213, 49 Stat. 849.

§ 824c. Issuance of securities; assumption of liabilities; filing duplicate reports with Securities and Exchange Commission

(a) No public utility shall issue any security, or assume any obligation or liability as guarantor, indorser, surety, or otherwise in respect of any security of another person, unless and until, and then only to the extent that, upon application by the public utility, the Commission by order authorizes such issue or assumption of liability. The Commission shall make such order only if it finds that such issue or assumption (a) is for some lawful object, within the corporate purposes of the applicant and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the applicant of service as a public utility and which will not impair its ability to perform that service, and (b) is reasonably necessary or appropriate for such purposes. The provisions of this section shall be effective six months after Aug. 26, 1935.

(b) The Commission, after opportunity for hearing, may grant any application under this section in whole or in part, and with such modifications and upon such terms and conditions as it may find necessary or appropriate, and may from time to time, after opportunity for hearing and for good cause shown, make such supplemental orders in the premises as it may find necessary or appropriate, and may by any such supplemental order modify the provisions of any previous order as to the particular purposes, uses, and extent to which, or the conditions under which, any security so theretofore authorized or the proceeds thereof

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may be applied, subject always to the requirements of subsection (a) of this section.

(c) No public utility shall, without the consent of the Commission, apply any security or any proceeds thereof to any purpose not specified in the Commission's order, or supplemental order, or to any purpose in excess of the amount allowed for such purpose in such order, or otherwise in contravention of such order.

(d) The Commission shall not authorize the capitalization of the right to be a corporation or of any franchise, permit, or contract for consolidation, merger, or lease in excess of the amount (exclusive of any tax or annual charge) actually paid as the consideration for such right, franchise, permit, or contract.

(e) Subsection (a) of this section shall not apply to the issue or renewal of, or assumption of liability on, a note or draft maturing not more than one year after the date of such issue, renewal, or assumption of liability, and aggregating (together with all other then outstanding notes and drafts of a maturity of one year or less on which such public utility is primarily or secondarily liable) not more than 5 per centum of the par value of the other securities of the public utility then outstanding. In the case of securities having no par value, the par value for the purpose of this subsection shall be the fair market value as of the date of issue. Within ten days after any such issue, renewal, or assumption of liability, the public utility shall file with the Commission a certificate of notification, in such form as may be prescribed by the Commission, setting forth such matters as the Commission shall by regulation require.

(f) The provisions of this section shall not extend to a public utility organized and operating in a State under the laws of which its security issues are regulated by a State commission.

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(g) Nothing in this section shall be construed to imply any guarantee or obligation on the part of the United States in respect of any securities to which the provisions of this section relate.

(h) Any public utility whose security issues are approved by the Commission under this section may file with the Securities and Exchange Commission duplicate copies of reports filed with the Federal Power Commission in lieu of the reports, information, and documents required under section 77g and sections 78l and 78m of Title 15. June 10, 1920, c. 285, § 204, as added Aug. 26, 1935, c. 687, Title II, § 213, 49 Stat. 850.

§ 824d. Rates and charges; schedules; suspension of new rates

(a) All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every public utility shall file with the Commission, within such time and in such form as the

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Commission may designate, and shall keep open in convenient form and place for public inspection schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any public utility in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint or upon its own initiative without complaint, at once, and, if it so orders, without answer or formal pleading by the public utility, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the public utility affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of

such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of such five months, the proposed change of rate, charge, classification, or service shall go into effect at the end of such period, but in case of a proposed increased rate or charge, the Commission may by order require the interested public utility or public utilities to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require such public utility or public utilities to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the public utility, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible. June 10, 1920, c. 285, § 205, as added Aug. 26, 1935, c. 687, Title II, § 213, 49 Stat. 851.

§ 824e. Power of Commission to fix rates and charges; determination of cost of production or transmission

(a) Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or

collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order.

(b) The Commission upon its own motion, or upon the request of any State commission whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transmission of electric energy by means of facilities under the jurisdiction of the Commission in cases where the Commission has no authority to establish a rate governing the sale of such energy. June 10, 1920, c. 285, § 206, as added Aug. 26, 1935, c. 687, Title II, § 213, 49 Stat. 852.

§ 825d. Officials dealing in securities; declaring dividends out of capital account; interlocking directorates

(a) It shall be unlawful for any officer or director of any public utility to receive for his own benefit, directly or indirectly, any money or thing of value in respect of the negotiation, hypothecation, or sale by such public utility of any security issued or to be issued by such public utility, or to share in any of the proceeds thereof, or to participate in the making or paying of any dividends of such public utility from any funds properly included in capital account.

(b) After six months from August 26, 1935, it shall be unlawful for any person to hold the position of officer or director of more than one public utility or to hold the position of officer or director of a public utility and the

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position of officer or director of any bank, trust company, banking association, or firm that is authorized by law to underwrite or participate in the marketing of securities of a public utility, or officer or director of any company supplying electrical equipment to such public utility, unless the holding of such positions shall have been authorized by order of the Commission, upon due showing in form and manner prescribed by the Commission, that neither public nor private interests will be adversely affected thereby. The Commission shall not grant any such authorization in respect of such positions held on August 26, 1935, unless application for such authorization is filed with the Commission within sixty days after that date, June 10, 1920, c. 285, § 305, as added Aug. 26, 1935, c. 687, Title II, § 213, 49 Stat. 856.

§ 825e. Complaints

Any person, State, municipality, or State commission complaining of anything done or omitted to be done by any licensee or public utility in contravention of the provisions of this chapter may apply to the Commission by petition which shall briefly state the facts, whereupon a statement of the complaint thus made shall be forwarded by the Commission to such licensee or public utility, who shall be called upon to satisfy the complaint or to answer the same in writing within a reasonable time to be specified by the Commission. If such licensee or public utility shall not satisfy the complaint within the time specified or there shall appear to be any reasonable ground for investigating such complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall find proper. June 10, 1920, c. 285, § 306, as added Aug. 26, 1935, c. 687, Title II, § 213, 49 Stat. 856.

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§ 825f. Investigations by Commission; attendance of witnesses; depositions; immunity of witnesses

(a) The Commission may investigate any facts, conditions, practices, or matters which it may find necessary or proper in order to determine whether any person has violated or is about to violate any provision of this chapter or any rule, regulation, or order thereunder, or to aid in the enforcement of the provisions of this chapter or in prescribing rules or regulations thereunder, or in obtaining information to serve as a basis for recommending further legislation concerning the matters to which this chapter relates. The Commission may permit any person to file with it a statement in writing under oath or otherwise, as it shall determine, as to any or all facts and circumstances concerning a matter which may be the subject of investigation. The Commission, in its discretion, may publish or make available to State commissions information concerning any such subject. (§307)

§ 825l. Rehearings; court review of orders

(a) Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such

person shall have made application to the Commission for a rehearing thereon. Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b) of this section, the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.

(b) Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the United States Court of Appeals for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of Title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satis-

faction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 346 and 347 of Title 28.

(c) The filing of an application for rehearing under subsection (a) shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order. June 10, 1920, c. 285, § 313, as added Aug. 26, 1935, c. 687, Title II, § 213, 49 Stat. 860, and amended June 25, 1948, c. 646, § 32 (a), 62 Stat. 991; May 24, 1949, c. 139, § 127, 63 Stat. 107; Aug. 28, 1958, Pub.L. 85-791, § 16, 72 Stat. 947.

CLAYTON ACT

TITLE 15 USCA

§21. Enforcement provisions—Commissions and Boards authorized to enforce compliance

(a) Authority to enforce compliance with sections 13, 14, 18, and 19 of this title by the persons respectively subject thereto is vested in the Interstate Commerce Commission where applicable to common carriers subject to the Interstate Commerce Act, as amended; in the Federal Communications Commission where applicable to common carriers engaged in wire or radio communications or radio transmission of energy; in the Civil Aeronautics Board where applicable to air carriers and foreign air carriers subject to the Civil Aeronautics Act of 1938; in the Federal Reserve Board where applicable to banks, banking associations, and trust companies; and in the Federal Trade Commission where applicable to all other character of commerce to be exercised as follows:

Issuance of complaints for violations; hearing; intervention; filing of testimony; report; cease and desist orders; reopening and alteration of reports or orders

(b) Whenever the Commission or Board vested with jurisdiction thereof shall have reason to believe that any person is violating or has violated any of the provisions of sections 13, 14, 18, and 19 of this title, it shall issue and serve upon such person and the Attorney General a complaint stating its charges in that respect, and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the Commission or Board requiring such person to cease and desist from the viola-

tion of the law so charged in said complaint. The Attorney General shall have the right to intervene and appear in said proceeding and any person may make application, and upon good cause shown may be allowed by the Commission or Board, to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the Commission or Board. If upon such hearing the Commission or Board, as the case may be, shall be of the opinion that any of the provisions of said sections have been or are being violated, it shall make a report in writing, in which it shall state its findings as to the facts, and shall issue and cause to be served on such person an order requiring such person to cease and desist from such violations, and divest itself of the stock, or other share capital, or assets, held or rid itself of the directors chosen contrary to the provisions of sections 18 and 19 of this title, if any there be, in the manner and within the time fixed by said order. Until the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, or, if a petition for review has been filed within such time then until the record in the proceeding has been filed in a court of appeals of the United States, as hereinafter provided, the Commission or Board may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section. After the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, the Commission or Board may at any time, after notice and opportunity for hearing, reopen and alter, modify, or set aside, in whole or in part, any report or order made or issued by it under this section, whenever in the opinion of the Commission or

Board conditions of fact or of law have so changed as to require such action or if the public interest shall so require: *Provided, however,* That the said person may, within sixty days after service upon him or it of said report or order entered after such a reopening, obtain a review thereof in the appropriate court of appeals of the United States, in the manner provided in subsection (c) of this section. (§11)

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No. 71-1178

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IN THE

Supreme Court of the United States

October Term 1971

GULF STATES UTILITIES COMPANY,
Petitioners,

v.

FEDERAL POWER COMMISSION
CITY OF LAFAYETTE, LOUISIANA
CITY OF PLAQUEMINE, LOUISIANA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE CITIES OF LAFAYETTE AND PLAQUEMINE, LOUISIANA, IN OPPOSITION

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April 12, 1972

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE CITIES OF LAFAYETTE AND PLAQUEMINE, LOUISIANA, IN OPPOSITION

Section 204 of the Federal Power Act, 16 U.S.C. 824 (Pet. 47a - 49a)[1/] provides that, with certain exceptions not here relevant, no public utility shall issue any security unless authorized to do so by the Federal Power Commission, which shall make such authorization only if, *inter alia*, it finds that the issue "is for some lawful object . . . compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the applicant of service as a public utility . . . . "

[1/] "Pet." references are to the petition for Certiorari. "R" references are to the Joint Appendix filed in the court below.

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Section 204(b) of that Act provides that the Federal Power Commission may act, "after opportunity for hearing" to grant any application in whole or in part, with such modification and upon such terms and conditions as it may find necessary or appropriate, and may from time to time after opportunity for hearing and upon good cause, make supplemental orders which may "modify the provisions of any previous order as to the particular purposes, uses, and extent to which or the conditions under which, any security so theretofore authorized or the proceeds thereof may be applied . . . . " Section 204 (c) of that Act specifies that no proceeds of a security issue authorized by the Federal Power Commission shall be spent for any purpose not specified in the Commission's order.

Petitioner, Gulf States Utilities Company ("Gulf States") sought the authorization of the Federal Power Commission under Section 204 of the Federal Power Act for the issuance of bonds, the proceeds of which would be used to pay off a part of the Company's short term indebtedness.[2/] Respondents, the Cities of Lafayette and Plaquemine, Louisiana ("Cities") filed a protest and petition to intervene before the Federal Power Commission, charging that the funds authorized would be used in the course or furtherance of a conspiracy among Gulf States and two other electric utilities to monopolize the wholesale or bulk supply of electric energy in Louisiana, in violation of the antitrust laws and policies of the United States, and thus for objects which were neither lawful, compatible with the public interest, nor necessary or appropriate for the proper performance by Gulf States of service as a public utility.[3/] The Federal Power Commission, without hearing, granted the authorization sought by Gulf States (Pet. 32a - 37a), and thereafter denied rehearing (Pet. 41a - 42a).

[2/] Gulf States and the Commission have taken the position that the reduction of short term indebtedness by refinancing would free for further use without new authorization that much of the Gulf States' previous short term financing authorization as is so released by refinancing.

[3/] The Cities Protest and Petition to Intervene is set out in full at R 54-160

The reversal of this action of the Federal Power Commission by the Court of Appeals of the District of Columbia Circuit (Pet. 1a - 29a) was clearly correct, and the petition for certiorari raises no issues of substance appropriate for resolution at this time.

1. Petitioners contend (Pet. 5 - 10) that because the Federal Power Commission is not delegated responsibility by Section 11 of the Clayton Act, 15 U.S.C. 21, to enforce that Act, it must ignore violations of the Sherman and Clayton Acts when it determines whether the proposed use of funds "is for some lawful object . . . compatible with the public interest . . . ." under Section 204. The short answer is that Section 204 of the Federal Power Act is simply not susceptible to such a narrow reading. Moreover, as this Court held in *Denver and Rio Grande Western R. v. United States*, 387 U.S. 485, 492-493 (1967), interpreting a statute after which Section 204 was modeled, the term "public interest" is to be read "broadly, to require consideration of all important consequences including anticompetitive effects." See also, e.g., *California v. FPC*, 369 U.S. 482 (1962); *FMC v. Aktiebolaget Svenska Amerika Linien*, 390 U.S. 238 (1968); *Municipal Electric Association of Massachusetts v. SEC*, 413 F.2d 1052 (D.C. Cir. 1969); *Marine Space Enclosures v. FMC*, 420 F.2d 571 (D.C. Cir. 1969); *Northern Natural Gas Company v. FPC*, 399 F.2d 953 (D.C. Cir. 1968), none of which involve agencies given specific enforcement functions by Section 11 of the Clayton Act.

2. Petitioners contend (Pet. 10) that there is no support in logic or policy for interpreting Section 7 of the Public Utility Holding Company Act, 15 U.S.C. 79g, differently from Section 204 of the Federal Power Act. The Cities consider that there are inconsistencies between the interpretations of the two acts by the court below, and if certiorari is granted, reserve the right to argue that both statutes require review by the agencies of anticompetitive consequences of the authorization. That does not warrant the grant of certiorari at the present time, however.

3. Petitioners contend (Pet. 10 - 12) that the court below erred in setting aside a decision of the Federal Power Commission supported by "substantial evidence". The *only* evidence in the record before the Federal Power Commission was the application of Petitioners, since the Federal Power Commission approved the issuance of the bonds without giving the Cities the statutorily required opportunity for a hearing. To the extent that the Federal Power Commission's order might have been thought to rest upon a contention that a mere change in form from short to long term debt was not relevant, that contention was in effect abandoned when the Commission conceded that (as noted by the court below, Pet. 20a) the issuance of $30 million in bonds would free an additional $30 million in short term note authorization.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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2600 Virginia Avenue, N.W.
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April, 1972

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1178

GULF STATES UTILITIES CO., PETITIONER

v.

FEDERAL POWER COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

---

1. Petitioner seeks review of the court of appeals' decision (Pet. App. 1a-29a) remanding to the Federal Power Commission for further proceedings this case in which the Commission, pursuant to Section 204 of the Federal Power Act, 16 U.S.C. 824c, had authorized petitioner to issue $30 million of first mortgage bonds. The proceeds from the sale of the bonds were to be used to replace outstanding short-term notes.

Subsequent to the filing of petitioner's application for authorization to sell the bonds with the Commis-

sion, the Cities of Lafayette and Plaquemine, Louisiana, filed a protest and petition to intervene alleging that petitioner had engaged in certain anticompetitive practices in violation of the antitrust laws; the cities requested the Commission to withhold authorization of the issuance of the securities and to hold a hearing on the allegations (Pet. App. 34a). The Commission granted the petition to intervene, but denied the requested hearing on the ground that the alleged violations "are irrelevant to a requested authorization of securities" (Pet. App. 34a-36a). The Commission further stated that there was no relief it could order in the context of the proceeding that "would have any effect on the interest of the [cities], or solve any of the problems outlined by them" (Pet. App. 35a).

On petitions for review, the court held that the Commission must consider antitrust allegations when authorizing the issuance of securities under Section 204. The court rejected the Commission's prior determination in *Pacific Power & Light Co.*, 27 FPC 623, that its authority under Section 204 was limited to safeguarding the public against unsound financial practices, noting that the *Pacific Power & Light* ruling pre-dated this Court's decision in *Denver & Rio Grande Western R. Co.* v. *United States*, 387 U.S. 485. The court found the latter case controlling (Pet. App. 16a-18a) in light of the Commission's regulatory responsibilities under Section 202 (interconnection and coordination of facilities), 203 (mergers), and 206 (rates and charges) of the Act, 16 U.S.C. 824a, 824b and 824e (Pet. App. 18a-20a).

In remanding the case, the court of appeals noted that the Commission need not hold a hearing on the cities' allegations if it concluded that the allegations did not raise substantial anticompetitive issues or were not reasonably related to the issuance of the securities, as long as the record reflected the Commission's basis for so concluding (Pet. App. 22a). The court also recognized that questions relating to the issuance of securities to provide funds for a utility's construction program "must be decided in a time frame much more limited than often contemplated for antitrust litigation" (Pet. App. 22a-23a). Accordingly, the court suggested several options available to the Commission where antitrust allegations are made in Section 204 proceedings (Pet. App. 23a).[1]

---

[1] In another case consolidated with this one, the court of appeals affrmed two orders of the Securities and Exchange Commission authorizing under Section 7 of the Public Utility Holding Company Act, 15 U.S.C. 79g, the issuance of certain securiites by the Louisiana Power & Light Company, notwithstanding the Commission's failure to consider the cities' allegations that the company had engaged in certain anticompetitive practices (Pet. App. 24a-29a). In their memorandum in opposition to the petition in this case, the cities contend that there is no basis for distinguishing between the Securities and Exchange Commission's responsibilities under Section 7 of the Holding Company Act and the Federal Power Commission's responsibilities under Section 204 of the Federal Power Act and state that they "reserve the right" to attack the affirmance of the orders of the Securities and Exchange Commission if certiorari is granted (Mem. in Opp., p. 3). But, since the cities did not petition from that aspect of the court of appeals' decision and since their time to petition had expired prior to the filing of their memorandum in opposition, the propriety of the Securities and Exchange Commission orders is not in issue before this Court.

2. The Commission agrees with petitioner that the court of appeals erred in requiring the Commission to consider allegations of anticompetitive conduct in the context of a proceeding under Section 204, as distinguished from proceedings under other provisions of the Federal Power Act. In the Commission's view, the court of appeals failed to give proper weight to the Commission's own interpretation of Section 204 in *Pacific Power & Light* (see *Udall* v. *Tallman*, 380 U.S. 1) and misapplied this Court's decision in *Denver & Rio Grande*.[2] In view of the options left open to the Commission by the court below, however, the Commission does not now believe that the decision will seriously inhibit it in performing its statutory responsibilities to protect the consumer interest in an adequate and reliable, low cost supply of electric energy. The Commission is free under the decision to apply such remedies, if any, as may be appropriate under the Federal Power Act in the light of any anticompetitive practices it might find.

---

[2] As a result of the decision below, at least two, and possibly three, federal agencies will be considering the cities' allegations of anti-competitive practices. In addition to the Federal Power Commission's proceeding, the Department of Justice has issued Civil Investigative Demands to determine whether there is any basis for filing an antitrust complaint in a district court. Sec. 15 U.S.C. 1312. Moreover, the Atomic Energy Commission may be called upon to consider anticompetitive practices in connection with nuclear plant licensing cases. *Louisiana Power & Light Co.*, Docket Nos. 50-382A and 50-383A. See 42 U.S.C. 2135. At the present time, no means of consolidating discovery and the taking of evidence among the several agencies has been devised.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

GORDON GOOCH,
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Federal Power Commission.

MAY 1972.

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Petitioner,

v.

FEDERAL POWER COMMISSION,
CITY OF LAFAYETTE, LOUISIANA,
CITY OF PLAQUEMINE, LOUISIANA,

Respondents.

On Writ of Certiorari to The United States Court of Appeals for the District of Columbia Circuit

---

BRIEF FOR THE PETITIONER

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INDEX

	PAGE
Opinion Below	1
Jurisdiction	1
Questions Presented	2
Statutes Involved	2
Statement	2
Summary	5
Argument	6
I. FPC Had No Duty to Investigate Cities' Charges Because Congress Did Not Grant Power to the FPC to Deal With Sherman Act Violation Under § 204	9
A. In § 204 Proceeding, FPC Need Consider Only Matters Which Might Impair the Issuer's Financial Integrity or Ability to Perform Its Public Utility Responsibilities	9
1. The administrative interpretation of § 204 by the FPC is entitled to great weight and should be controlling here	9
2. Legislative history shows Congress was only concerned with financial integrity	12
B. FPC Duty in a § 204 Proceeding to Consider Charges of Prospective Sherman Act Violation Would at Most be Limited to Charges Related to Activities Within FPC Jurisdiction and Subject to its Regulation	20
C. Exclusion of Antitrust Considerations from §204 Proceeding Involving Issuance of Securities for Cash at Competitive Bidding Serves the Congressional Purpose and the Public Interest	24
II. If The FPC Had Jurisdiction to Investigate Sherman Act Violations in § 204 Proceedings, If It Saw Fit, Its Refusal to Do So in This Case Was Not Error	30
A. The FPC Finding that the Matters Asserted and Activities Alleged by the Cities Were Irrelevant to the Purpose of Issuing Bonds to Refund Short-Term Indebtedness Theretofore Authorized by the FPC Was a Fact Find-	

PAGE

ing or Conclusion Which the Court of Appeals Below Was Not Free to Set Aside or Disregard 30

B. As Intervenors in a § 204 proceeding Cities Would Not Have Been Entitled to a Hearing Even if They Had Raised Substantial and Relevant Issues 32

Conclusion 36

Appendix A, Federal Power Act § 204, 16 U.S.C. § 824c 1a

CITATIONS

Cases

Alabama Electric Cooperative, Inc. v. Securities and Exchange Commission, 353 F.2d 905 (D.C. Cir. 1965) cert. den. 383 U.S. 968 (1966) 18, 19

Alabama Electric Cooperative, Inc. v. Securities and Exchange Commission, 359 F.2d 434 (5th Cir. 1966) 19

California v. Federal Power Commission, 369 U.S. 482 (1962) 9

California Motor Transport Co., et al, v. Trucking Unlimited, 92 S. Ct. 609 (January 13, 1972) 21

Cardillo v. Liberty Mutual Insurance Co., 330 U.S. 469 (1947) 33

City of Lafayette v. Securities and Exchange Commission, 454 F.2d 941 (D.C. Cir. 1971) 1, 4, 6, 18

Denver & Rio Grande Western Railroad Co. v. United States, 387 U.S. 485 (1967) 5-11, 19, 28

Denver Union Stockyard Co. v. Producers Livestock Marketing Assn., 356 U.S. 282 (1958) 35

Eastern Railroad's President's Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961) 21

Federal Communications Commission v. RCA Communications, Inc., 346 U.S. 86 (1953) 17

Federal Power Commission v. Florida Power & Light Co., 92 S. Ct. 637 (January 12, 1972) 32

Federal Power Commission v. Louisiana Power & Light Co., — U. S. —, No. 71-1016, June 7, 1972 29

Federal Power Commission v. Transcontinental Gas Pipeline Co., 365 U.S. 1 (1961) 19

Flast v. Cohen, 392 U.S. 83 (1968) 30

Gainesville Utilities Dept. v. Florida Power Corp., 402 U.S. 515 (May 24, 1971) 32

Gray v. Powell, 314 U.S. 402 (1941) 32

Groendyke Transport, Inc. v. Davis, 406 F.2d 1158 (5th Cir. 1969), cert. den. 394 U.S. 1012 35

BLEED THROUGH POOR COPY

PAGE

McLean Trucking Co. v. United States, 321 U.S. 67 (1944) 23, 24
Miller v. United States, 277 F. 95 (1921) 34
Morgan v. United States, 304 U.S. 1 (1938) 35
Munic. Elec. Assn. of Mass. v. Federal Power Commission, 414 F.2d 1206 (D. C. Cir. 1969) 29
NAACP, FPC Docket No. R-447, Opin. No. 623, July 11, 1972 23
Pacific Power & Light Co., 27 FPC 623, 43 P.U.R. 3d 86 ..... 10, 11, 27
Pennsylvania Gas & Water Co. v. Federal Power Commission, No. 71-1126, ... F.2d ..... (D. C. Cir. May 2, 1972) 35
Securities and Exchange Commission v. Chenery Corp., 332 U.S. 194 (1947) 33
Sierra Club v. Morton, 92 S. Ct. 1361 (1972) 30
The Chicago Junction Case, 264 U.S. 258 (1924) 8
Udall v. Tallman, 380 U.S. 1 (1965) 11
United States v. Chicago, M., St., P. & R. Co., 282 U.S. 311 (1931) 22
United States v. Storer Broadcasting Co., 351 U.S. 192 (1956) 35
Western Mass. Elec. Co. Proj. No. 1889, 39 FPC 723 (1968), rehearing denied, 40 FPC 296, aff'd. 414 F.2d 1206 (D. C. Cir. 1969) 29

STATUTES

Federal Power Act 9, 11, 16, 20, 21, 23, 27
Subchapter II, 16 U.S.C., §§ 824-824h, *formerly* 49 Stat. 847 (1935) 2
Section 201, 16 U.S.C. § 824 ..... 2, 9
Section 202, 16 U.S.C. §§ 824a 22, 29
Section 202, subsections (a) and (b), 16 U.S.C. § 824a 2, 21, 22
Section 203, 16 U.S.C. § 824b 2, 5, 21, 33, 34
Section 204, 16 U.S.C. § 824c 2, 3, 5, 6, 9-15, 18-24, 26, 28-30, 32-34, 36, 1a
Section 204(a), 16 U.S.C. § 824c(a) 14, 33
Section 204(b), 16 U.S.C. § 824c(b) 33, 34
Section 204(e), 16 U.S.C. § 824c(e) 25
Section 204(f), 16 U.S.C. § 824c(f) 15
Section 205, 16 U.S.C. § 824d 2, 21

PAGE

Section 206, 16 U.S.C. § 824e 2, 21
Section 206, subsection (a), 16 U.S.C. §824e 14
Section 305, 16 U.S.C. § 825d 2, 21
Section 306, 16 U.S.C. § 825e 2, 29
Section 307, 16 U.S.C. § 825f 2, 22
Section 308, subsections (a) and (b), 16 U.S.C. § 825g 35
Section 313, 16 U.S.C. § 825 *l* 2, 32

Interstate Commerce Act 9, 11, 16, 20, 23
Section 5, 49 U.S.C. 7, 8, 33, 34
Section 20a, 49 U.S.C. 20a 6-11, 14, 23

Sherman Act 8, 9, 20, 23, 24
Securities Act of 1933 32

Clayton Act 9, 11
Section 7, 15 U.S.C. § 18 ..... 7, 8
Section 11, subsections (a) and (b), 15 U.S.C. § 21 ..... 2, 7
Section 16, 15 U.S.C. § 26 28

Natural Gas Act 19

The Public Utility Act of 1935 ..... 11, 15, 17
Title I, 49 Stat. 838 ..... 19, 20
Title II, 49 Stat. 838 ..... 12, 19

Public Utility Holding Company Act of 1935 ..... 11, 19, 20
Title I, 49 Stat. 838 12
Section 6, 15 U.S.C. § 79 19
Section 6(a), 15 U.S.C. § 79f(a) 2
Section 7, 15 U.S.C. § 79g 19
Section 7(d) (6) 15 U.S.C. § 79g(d) (6) 2
28 U.S.C. § 1254(1) 1

LEGISLATIVE HISTORY

Senate Report No. 621, 74th Congress, 1st Session (1935):
Report pp. 2-3 12
Report pp. 11-12 17
Report p. 18 20
Report p. 20 14
Report p. 50 13
Report p. 56 13

PAGE

Report p. 59 ..... 13, 18
Appendix, pp. 1-60 12
Appendix, pp. 55-60 12

Hearings on S. 1725, Senate Committee on Interstate Commerce, 74th Congress, 1st Session (1935), p. 983 14

H.R. Report 1318, 74th Cong. 1st Sess. (1935):
Report p. 28 14
Report pp. 1-54 12

H.R. 5423; Hearings on H.R. 5423 H. R. Committee on Interstate and Foreign Commerce, 74th Congress, 1st Session:
Hearings pt. 1, p. 33 14
Hearings p. 554 16-17

Congressional Record — House — 74th Cong. 1st Session (June 28, 1935), Vol. 79, Part 9, p. 10378 15

TEXTS

1 Sharfman, *Interstate Commerce Commission* 190 (New York 1931) 10

Priest, *Principles of Public Utility Regulation*, (1969) 26, 27, 28

REGULATIONS

FPC Regulation:
Section 34a 3
Section 34.1a (b) 25
Part 34 32

MISCELLANEOUS

Federal Power Commission Notice of Proposed Rule Making, Docket No. R443, May 26, 1972 25
National Transportation Policy, 49 U.S.C.A. (Note preceding § 1.) 7, 8, 9
1970 Annual Report of FPC 24
1971 Annual Report of FPC 24

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v.

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CITY OF PLAQUEMINE, LOUISIANA,

Respondents.

On Writ of Certiorari to The United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR THE PETITIONER

OPINION BELOW

The opinion of the Court of Appeals (Pet. App. at 1a) is reported at 454 F. 2d 941 (1971).

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered October 12, 1971 (Pet. App. B, at p. 30a). Petition for rehearing was denied December 15, 1971 (Pet. App. C, at p. 31a). The petition for writ of certiorari was filed March 13, 1972, and was granted May 30, 1972. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the FPC has a duty to investigate charges of Sherman Act violations under § 204 of the Federal Power Act.

2. Whether the FPC and the SEC have different duties for investigation of alleged Sherman Act violations in proceedings under § 204 of the Federal Power Act and under § 6 (a) and § 7 (d) (6) of the Public Utility Holding Company Act, respectively.

3. Whether the Court of Appeals can require the FPC to investigate antitrust allegations found to be irrelevant by the FPC.

STATUTES INVOLVED

Section 204 of the Federal Power Act, 16 U.S.C. §824c, a part of Subchapter II of the Federal Power Act, 16 U.S.C. §§ 824-824h, formerly 49 Stat. 847 (1935), is the statutory provision directly involved and is set forth as Appendix A at the end of this brief.

Sections 201, 202, subsections (a) and (b), 203, 205, 206, 305, 306, 307, and 313 of the Federal Power Act, 16 U.S.C. § 824, § 824a, subsections (a) and (b), § 824b, § 824d, § 824e, § 825d, § 825e, § 825f, and § 825*l*, and § 11, subsections (a) and (b) of the Clayton Act, 15 U.S.C. § 21, subsections (a) and (b), are useful for comparison or related to argument and are set forth, as is § 204, 16 U.S.C. § 824c, in Pet. App. G. pp. 43a-59a, inclusive.

STATEMENT

The Federal Power Commission (FPC) proceeding in this case [FPC Docket No. E-7567] involved an application[1] by Petitioner, Gulf States Utilities Company (Gulf

[1] R 1-53. "R" refers to the Record in Joint Appendix filed in the Court of Appeals below and incorporated in the Single Appendix in this Court by grant of permission to do so.

States) for authority under § 204 of the Federal Power Act[2] to issue and sell $30,000,000 of First Mortgage Bonds for cash, at competitive bidding pursuant to FPC Regulation § 34a, for the purpose of repaying maturing short-term notes previously issued pursuant to an uncontested FPC order [FPC Docket E-7509]. The Cities of Lafayette and Plaquemine, Louisiana, (Cities) filed a Protest and Petition to Intervene[3] in this proceeding alleging that Gulf States had engaged in frivolous and repetitive litigation, a public relations drive, and a lobbying effort against the funding by the Rural Electrification Administration (REA) for construction of generation and transmission facilities by the Louisiana Electric Cooperative, Inc. (LEC) in the immediate service area of Gulf States in Louisiana. The Cities alleged further that GSU was negotiating with the Administrator of the REA and the LEC, in concert with two other adjoining, investor-owned electric utility companies, for a result inconsistent with a 1968 Pooling and Interconnection Agreement between the Cities, LEC, and the Dow Chemical Company "apparently" violative of the antitrust laws.[4] The Cities alleged that the proceeds of the bond issue would be used by Gulf States to finance or refinance such activities.[5] They urged that the financing could not be approved "unless conditioned on the cessation of such apparently unlawful actions and the establishment of a program which would rectify the damage which has already been done."[6] Cities' alle-

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[2] 16 U.S.C. § 824c, passed August 26, 1935, as Title II 49 Stat. 803. References merely to § 204 are intended as references to that section of the Federal Power Act.

[3] R 54-160.

[4] R 59-64.

[5] R 56.

[6] R 56.

gations are described in the opinion of the court below (Pet. App. A, pp. 5a-6a).[7] Gulf States answered (R. 263) pointing out that the bond proceeds would be used merely to refund short-term securities theretofore authorized by an uncontested FPC order and urging the irrelevancy of intervenors' contentions on that and other grounds.[8]

The FPC permitted Cities' intervention but without a hearing overruled the same and granted Gulf States authorization for issuance of the bonds (Pet. App. D, at p. 32a). Thereupon, Gulf States publicly invited competitive bids for the bonds, the best bid was approved by order of the FPC,[9] accepted by Gulf States and an agreement for purchase and sale of the bonds was entered into between Gulf States and the purchasers. Thereafter purchasers, within the next several days, resold to the general public in accord with investment banking practice. Cities' petition for rehearing was overruled by the FPC (Pet. App. F, at p. 41a). Cities filed Petitions for Review of Orders of the FPC in the U. S. Court of Appeals for the District of Columbia Circuit, where it was docketed as Cause No. 71-1041 and consolidated, for purposes of argument, with Causes Nos. 24,764 and 24,963 wherein Cities were petitioners, Securities and Exchange Commission (SEC) was respondent and Louisiana Power & Light Company was intervenor. The court disposed of all three numbered causes in a single opinion (Pet. App. A, p. 1a). Facts and contentions of the parties are more extensively set forth in the opinion of the Court of Appeals below (Pet. App. A, p. 1a, 5a-6a).

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[7] *City of Lafayette* v. *Securities and Exchange Commission*, 454 F.2d 941, 944-5 (D.C. Cir. 1971).

[8] R 263-74.

[9] R 310-11.

SUMMARY

Congress granted the FPC limited authority over securities issues in § 204 to fill a gap in state regulation and to prevent operating electric utilities from engaging in unsound financial practices such as some holding companies had used to produce unjustified increases in the cost of service to the public. It did not intend § 204 to be used as a source of plenary jurisdiction over electric utility operations and practices, nor as a source of FPC responsibility to protect or establish competition in the electric utility industry.

In this case the FPC fulfilled its public interest responsibility under § 204 by refusing to allow the Cities to interfere with a pure financial transaction essential to the financial integrity of the applicant and an integral part of arrangements to pay for facilities to serve expanding electric demand. The FPC should not be required to provide a catch-all forum in proceedings under § 204, for intervenors' complaints of alleged unlawful activities. This is most clear with respect to issuance of securities to the public for cash at competitive bidding under review by the FPC. Such an issuance and the consequent refunding of authorized short-term indebtedness simply did not raise any threshold issues of monopolization or other violation of the Sherman Act.

The concern of this Court in *Denver & Rio Grande* about the competitive issues involved in *acquisition* of securities is not applicable here, since the instant case does not involve issuance of securities to or for the acquisition of another utility. If this Court now had before it such a case, § 203 of the Federal Power Act, its underlying policies, and the principles of *Denver & Rio Grande* each would need examination independently.

The Court should reverse and instruct that the FPC has no jurisdiction or duty to investigate or order hearings under §204 of complaints such as those made by the Cities in this case.

ARGUMENT

Denver & Rio Grande Western Railroad Co. v. United States[10] is Inapplicable to the Case Now Before this Court.

The court below treated *Denver & Rio Grande* as controlling here. It undertook no independent analysis of the issue in the instant case beyond deciding that the FPC must administer § 204 of the Federal Power Act as the Supreme Court in *Denver & Rio Grande* had required the ICC to administer § 20a of the Interstate Commerce Act. This is evident from the Court of Appeals' opinion as a whole and from its specific statement:

> The action of the FPC in the order before us is plainly inconsistent with its duties as developed in *Denver & Rio Grande*.[11]

If *Denver & Rio Grande* does not support the judgment of the court below, then it has no support. Accordingly, it is deemed first in order of importance to distinguish *Denver & Rio Grande* before proceeding to the merits of the issue before this Court.

The question before the court in *Denver & Rio Grande* was whether the ICC complied with its statutory responsibilities in a proceeding under § 20a of the Interstate Commerce Act when it approved without consideration of control or anticompetitive consequences the issuance to Greyhound Corporation (Greyhound) of 500,000 shares which

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[10] 387 U.S. 485 (1967).

[11] Pet. App. A, p. 16a; 454 F.2d 941, 950.

would constitute 20% of the common stock of Railway Express Agency, Inc. (Railway Express).[12] The application for authorization revealed a plan by which Greyhound might subsequently acquire a majority of the outstanding shares. Both Railway Express and Greyhound were subject to ICC jurisdiction, as noted in the lower court opinion in *Denver*. Minority stockholders of Railway Express, motor bus competitors of Greyhound and others, including the Justice Department, intervened in the proceedings to protest. Intervenors sought a hearing on the questions whether Greyhound's acquisition of the stock was in the "public interest" and for a lawful object" and raised the issue that the 500,000 share sale was the first step toward establishing a virtual monopoly of express transportation and "control" by Greyhound of Railway Express, necessitating a hearing under § 5 of the Interstate Commerce Act which deals with control of one carrier by another through acquisition of stock. The Justice Department, as an intervenor, urged the ICC to conduct a hearing to determine whether the transaction would violate § 7[13] of the Clayton Act concerning acquisitions of stock with the effect of substantially lessening competition or tending to create a monopoly. The ICC approved Railway Express' issuance of 500,000 shares without a hearing. The Supreme Court declared that § 20a, like § 5, must be read in the context of overall ICC responsibilities, that such *responsibilities included enforcement of the Clayton Act* under § 11[14] of that Act, and also that *the advancement of the National Transportation Policy,*[15] *read into the "public interest" standard of § 5, was another persistent and overriding duty, equally applicable to § 20a.*

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[12] 387 U.S. 485, 487.
[13] 15 U.S.C. §18.
[14] 15 U.S.C. §21.
[15] The National Transportation Policy provides for regulation to

This Court held under the facts that the ICC could delay a hearing under § 5 of the Interstate Commerce Act, but held the record in the § 20a proceeding revealed serious questions *under § 7 of the Clayton Act* which *required the ICC to hold hearings* and that no justification existed for delay. Under the facts §7 did not relate to a *stock issue by Railway Express* but only to *stock acquisition by Greyhound* (as did § 5 of the Interstate Commerce Act). Greyhound had made no application. The only ICC proceeding before this Court for review was Railway Express' application to *issue* stock. Section 20a(6) which related to Railway Express' stock *issuance* provides that *hearings are not required* but that the ICC may hold hearings in a proceeding if it sees fit.[16] The opinion in *Denver & Rio Grande* states the question before the Court was whether the ICC had a statutory *duty* under § 20a to *consider* anticompetitive consequences of the stock issue by Railway Express. In the context of the proceeding before it, this Court held that it did, *taking into account ICC responsibilities under the Clayton Act and the National Transportation Policy.* In effect this Court held that in the proceeding before it the ICC must "consider" anticompetitive consequences because it could not shut its eyes to its responsibilities under other laws and thus must hold the hearings which § 7 of the Clayton Act required with regard to the prospective Greyhound stock acquisition revealed to the ICC in Railway Express' § 20a proceeding. The Sherman Act was not raised by the facts, contentions or arguments of the parties or discussed by the Court in *Denver & Rio Grande.*

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accomplish various things: *"without unjust discriminations, undue preferences, or advantages, as unfair or destructive competitive practices."* (Emphasis supplied.) 54 Stat. 899, 49 U.S.C.A. (note preceding § 1).

[16] 49 U.S.C. § 20a(b). See *The Chicago Junction Case,* 264 U.S. 258, 265, n. 10 (1924).

What the opinion in *Denver & Rio Grande* made crystal clear was that the ICC must read into the "public interest" test of § 20a of the Interstate Commerce Act anticompetitive responsibilities imposed upon it by the Clayton Act and the National Transportation Policy. The policy declaration in § 201[17] of the Federal Power Act and in the legislative history thereof shows no such responsibilities. The FPC is not charged with the duty to enforce the Clayton Act,[18] and is not governed by the National Transportation Policy. By failing to recognize the distinction inherent in those factors and in the factual context within which the statutes were being considered, as it must in fairly judging FPC responsibility under § 204 of the Federal Power Act, and by relying on a similarity of language between § 204 and parts of § 20a, the Court of Appeals fell into the error of tracking in this case the directions of this Court to the ICC in *Denver & Rio Grande*. The breadth of jurisdiction as well as the focus of public interest of the FPC under the Federal Power Act are altogether different from those of the ICC under the Interstate Commerce Act. The court below should not have treated *Denver & Rio Grande* as controlling in the instant case.

I. FPC Had No Duty to Investigate Cities' Charges Because Congress Did Not Grant Power to the FPC to Deal With Sherman Act Violation Under § 204.

A. In § 204 Proceeding, the FPC Need Consider Only Matters Which Might Impair the Issuer's Financial Integrity or Ability to Perform Its Public Utility Responsibilities.

1. The administrative interpretation of § 204 by the FPC is entitled to great weight and should be controlling here.

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[17] 16 U.S.C. §824.

[18] *California* v. *Federal Power Commission*, 369 U.S. 482 (1962).

The FPC has said:

> The plain purpose of § 204 is to prevent the issuance of securities which might impair the company's financial integrity or its ability to perform its public utility responsibilities.[19]

In doing so the FPC considered the purpose of § 20a of the Interstate Commerce Act from which the draftsman of § 204 borrowed language, and said:

> The leading historian of the Interstate Commerce Commission summed up the purposes of § 20a as follows:
>
> "While this extension of the commission's authority was designed, indirectly, to protect the investing public against the dissipation of railroad resources through faulty or dishonest financing, its dominant purpose was to maintain a sound structure for the rehabilitation and support of railroad credit, and for the consequent development of the transportation system. It aimed to render impossible the recurrence of the various financial scandals, with their destruction of confidence in railroad investment, which had become notorious, and to prevent the subordination of the carriers' stake as transportation agencies to the financial advantage of alien interests." 1 Sharfman, Interstate Commerce Commission 190 (New York 1931).
>
> It is apparent that in modeling § 204, 16 U.S.C.A. § 824c, upon § 20a of the Interstate Commerce Act, 49 U.S.C.A. § 20a, Congress must have had similar objectives.[20]

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[19] *Pacific Power & Light Co.*, 27 F.P.C. 623, 626 43 P.U.R. 3d. 86, 90 (1962).

[20] *Pacific Power & Light Co.*, 27 F.P.C. 623, 627, 43 P.U.R. 3d 86, 91 (1962).

The Court of Appeals gave no weight to *Pacific Power & Light Company* treating it, in effect, as overruled by *Denver & Rio Grande*. But this Court did not differ there with Sharfman as to the purpose of § 20a or undercut the FPC's reliance on his views in *Pacific Power and Light*. In effect the holding in *Denver & Rio Grande* is that the ICC could not shut its eyes to facts appearing in a § 20a proceeding which revealed its obligation under the Clayton Act to hold a hearing.

The Public Utility Holding Company Act of 1935, and the Federal Power Act originated as parts of a single act, The Public Utility Act of 1935, and are among the few enacted to regulate particular industries in the public interest which confer on the administering agency authority over the issuance of securities. Both the SEC and the FPC, when presented with the issue as a case of first impression, interpreted the acts which it was their primary responsibility to administer as not requiring consideration of control or anticompetitive consequences in exercising their duty to consider approval of the issuance of securities.

The FPC's construction of § 204 has stood since 1962. This Court has said:

> When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agents charged with its administration.[21]

In failing to give appropriate deference to FPC construction of § 204, the Court of Appeals erred.

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[21] *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965).

2. Legislative history shows Congress was only concerned with financial integrity.

Section 204 of the Federal Power Act was enacted as Title II of the Power Utility Act of 1935.[22] The Act was an outgrowth of increasing national concern about concentration of control and financial manipulation in the public utility business, in particular the public utility holding companies. It is evident from the messages of the President,[23] the report of the National Power Policy Committee,[24] and the committee reports to the Senate[25] and House[26] that the motivating concern, underlying the legislation to control holding companies permitted to continue as such, as well as the operating units to be spun off and regulated under Title II, was to put the public utility industry on a sound financial basis to restore investors' confidence in and strengthen the market for utility securities, and to protect the public against unsound financial practices.[27]

The committee report to the Senate expressly stated this policy:

> Control over the capitalization of operating utilities is plainly an essential means of safeguarding the public against the unsound financial practices which make

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[22] 49 Stat. 838. Title I of such Act is known as the Public Utility Holding Company Act of 1935.

[23] Sen. Rep. No. 621, 74th Congress, 1st Session, pp. 2-3 (1935).

[24] Id., Appendix, pp. 55-60.

[25] Id., pp. 1-60.

[26] H.R .Rep. No. 1318, 74th Congress, 1st Session, pp. 1-54 (1935).

[27] The President stated with regard to the first drafts of the bill, which were not changed in their overall thrust, that it would "surround the necessary reorganization of the holding company with safeguards which will in fact protect the investor." Message of March 12, 1935, Sen. Rep. No. 621, 74th Cong., 1st Sess., p. 2.

impossible the proper and most economical performance of public-utility functions.[28]

The committee report to the House made it clear that § 204 and the authority of the FPC under it were quite limited by stating that, "Under subsection (a) approval of security issues must be obtained in cases where no state commission has control. Approval *must* be given if the issue is for a lawful purpose, consistent with the proper

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The Report of the National Power Policy Committee on Public-Utility Holding Companies expressed the need to cure the then existing evils of "overcapitalization" and "unsound capitalization", "security charges far beyond the value of the holding company to the industry", "securities . . . issued to acquire new properties . . . at prices often far in excess of any reasonable estimate of the value of those properties", transactions injecting "temporary and unhealthy stimulation into the securities markets which discourages intelligent permanent investors," and accepted the advantages of "stable and predicable (sic) markets." *Id.*, p. 56.

The Report further emphasized that "Security issues should be limited to purposes necessary in the public interest, which accords with the ultimate purposes of the legislation; and each security issued should bear a proper relation to the capital of the company, its existing securities, the securities of the companies in a geographically and economically related system, and, above all, to the prudent investment in the properties of the issuer and its underlying companies. Except for necessary discretionary power in the commission in the case of refunding issues, new securities should be limited to par value common stock, with appropriate voting rights, and to first-lien bonds, i.e., bonds having a first lien either on physical assets of the issuer or upon first-mortgage bonds of operating subsidiaries.

"In this as in almost every phase of the holding-company problem the ultimate interests of consumers and investors are identical. In a system burdened with overcapitalized and debt-ridden holding companies, the consumers of operating subsidiaries have to support the topheavy structure by paying high rates and by enduring poor service from inadequately maintained plants." *Id.* p. 59.

The concern about *issuance* of securities evidenced above has a different focus from concern about *acquisition* of securities reflected in the following quote from the Report: "The commission should have power to prevent acquisitions at prices which do not bear a proper relation to the capital prudently invested in the underlying utility properties, or if the acquisition would tend to create monopoly or restraint of trade in the exercise of control of public-utility companies". (Emphasis supplied.) *Ibid.*

[28] Sen. Rep. No. 621, 74th Cong. 1st Sess. p. 50.

performance by the applicant of service as a public utility." (Emphasis supplied.)[29]

Congress simplified the language used in an earlier draft of § 204; but there is no evidence of Congressional intent thereby to expand the scope of administration of § 204 to include nonfinancial considerations.[30] The report to the Senate included a comment on the changed content of § 204 and, without disaffirming the language of the earlier bill, merely reported that such section:

> . . . has been rewritten to attain greater flexibility and workability than would have been possible under the original section. The language defining the purposes for which securities may be issued has been taken substantially from Section 20a of the Interstate Commerce Act, which has proved its usefulness.[31]

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[29] H.R. Rep. No. 1318, 74th Cong. 1st Sess., p. 28. This Report stated further that subsections (b), (c) and (d) were merely "procedural." Thus, they were not intended to expand the scope of FPC jurisdiction under § 204(a).

[30] An earlier draft of present § 204 was as follows:

> Section 206.(a) No public utility shall issue any security . . . unless and until, and then only to the extent that, upon application by the public utility, the Commission by order authorizes such issue. . . . The Commission shall make such order only if it finds that such issue . . . is for one or more of the following purposes and no others, and is reasonably necessary or appropriate for such purpose or purposes: The acquisition of property; the construction, completion, extension, or improvement of facilities or service of the public utility; the discharge or lawful refunding of its obligation; and the reimbursement of monies actually expended from sources other than the issue of securities for any of the aforesaid purposes ....

Hearings on H. R. 5423. H. R. Committee on Interstate and Foreign Commerce, 74th Cong. 1st Sess., pt. 1, p. 33.

[31] Sen. Rep. No. 621, 74th Cong., 1st Sess., p. 20.

The language change to achieve flexibility was apparently in response to a suggestion to add "or for such other purpose as the Commission might approve" to the itemized list of purposes in such original draft. See Hearings on S. 1725, Sen. Committee on Interstate Commerce, 74th Cong. 1st Sess., p. 983 (1935). The language change provided more administrative discretion but did not expand the basic intent to deal only with financial matters.

At the time Congress enacted the Public Utility Act of 1935, thirty-two[32] of the forty-eight states of the Union had state commissions which regulated the issuance of utility company securities. Yet the Congress drafted §204(f) so as to exempt securities issued by public utilities organized and operating in such states. This provision is in sharp contrast with provision of the Interstate Commerce Act which grants the ICC *exclusive* and *plenary* jurisdiction of approval of the issuance of securities of carriers subject to its control.[33] If the Congress had intended that control over issuance of securities be used by the FPC as a tool to accomplish purposes or enforce powers found outside of §204, it would have followed the pattern of the Interstate Commerce Act so readily at hand. The conclusion is inescapable that § 204 was intended only to insure that public utilities subject to the Federal Power Act not escape entirely regulation of the issuance of securities so as to guard the financial integrity of the issuers. The Congress did not even specify conditions as to the quality or extent of state regulation necessary to qualify for the exemption and obviously could not have depended on the individual states to weigh possible impact of federal antitrust laws as a factor in considering authorization of a securities issue. If Congress had intended that such factor be given weight in authorizing the issuance of securities by public utilities subject to the Federal Power Act, it would at the least have granted the FPC exclusive authority over the isuance of securities by all utilities subject to the Act. At the most, it would have specifically provided in the Federal Power Act (as a witness before a Congressional Committee hearing testified it would have

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[32] Congressional Record — House, 74th Con., 1st Session, Vol. 79, Part 9, p. 10378, June 28, 1935.

[33] 49 U.S.C. § 20a (7).

to do if such were its intention)[34] that the FPC consider anticompetitive matters in the grant or withholding of authority.

The legislative history reveals that Congress did not borrow the whole of Interstate Commerce Act philosophy and intended the utility business subject to the Federal Power Act to be on a different footing from other regulated industries, including railroads and other carriers, in that it did not intend to preserve or establish *competition* among public utilities subject to the Federal Power Act. A draftsman of the Federal Power Act testified that "nothing in the bill . . . provides for competition" and stated that "if Congress should desire to establish competition in this industry, it should be written in any legislation adopted by Congress."[35] No such provisions were added.

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[34] See quotation in next footnote.

[35] "MR. PETTENGILL. Mr. DeVane, I want to compliment you upon the patience with which you have stood here for almost 4 hours and answered every question we have asked, and we are asking them only for the purpose of obtaining information. We do not know as much about this as you do. I would like to ask you this question: Here is a market, let us say (indicating) in my home city; here is a generating plant, and we will say that that entire market is being supplied by this generating plant, and it is capable of furnishing sufficient power.

"Here is another generating plant owned by a competitor of this one (indicating and illustrating), and does not have access to this market. It has no transmission lines. Now, do you agree that by order of your Commission you may require this company (indicating) to carry that generating plant's (indicating) energy to that market in competition with the original company?

"MR. DEVANE. No, sir; if I understand your question, the answer to that is 'no'.

"MR. PETTENGILL. Well, section 202(a), makes it the duty of every public utility to transmit energy for any person, and so forth, and to furnish and maintain such services and facilities, and so forth. Now, how do you distinguish the language of the bill from the illustration that I have drawn?

"MR. DeVANE. You are talking about the power now; you

The intended division of the holding companies into operating units by the Public Utility Act of 1935 was not in anticipation of increased regional competition. Abandonment of competition as a method of control was accepted, and nonduplication of facilities was part of the plan to obtain electric service for the public at the lowest possible cost.[36]

With such lack of concern for competitive factors in the passage of the whole Federal Power Act, Congress could

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are talkng about a power to compel transmission?

"MR. PETTENGILL. Yes.

"MR. DeVANE. Power to compel carriers to transmit energy?

"MR. PETTENGILL. Yes.

"MR. DeVANE. That power is complete insofar as it may require transmission in certain cases. There is nothing in this bill, however, that provides for competition. It is entirely silent in that respect and differs from the language of the Interstate Commerce Commission, if that is what you may have in mind.

"There, as you recall, Congress provided that competition should be preserved and if Congress should desire to establish competition in this industry it should be written in any legislation adopted by Congress. There is nothing in this bill that permits one utility to enter another utility's field and in doing so to require the other utility to transport its power for the purpose. There is nothing like that in this bill." Hearings, H. R. Committee on Interstate and Foreign Commerce, 74th Cong. 1st Sess., p. 554.

[36] Sen. Rep. No. 621, supra at pp. 11, 12 states:

> Public utilities with their legalized monopolies are chartered to serve public ends. . . . An operating system whose management is confined in its interest, its energies, and its profits to the needs, the problems, and the service of one regional community is likely to serve that community better. . . . A regional system, with each company confined to consolidation of its own territory, will offer no chance for the territorial raids at fantastic prices with which for 15 years competing holding company systems disturbed the operating business.

It is significant to note here that review of funding for construction of duplicating facilities was the apparent goal of all or most of the activities of Gulf States alleged by the Cities.

Cf. Federal Communications Commission v. RCA Communications, Inc., 346 U.S. 86 (1953).

not have intended the simple provisions of § 204 to carry responsibility for such complex factors particularly in view of the stated goal of "flexibility and workability" to attain financial integrity for the industry.

The term "public interest" has often been interpreted to encompass broad authority, but it is not so used in § 204.[37] The FPC deals with different aspects of the whole of its "public interest" responsibility in operating under different parts of the Federal Power Act. Section 204 deals with the issuance of securities, and the prices at which securities are issued affect the *cost* of service to consumers and the *value* of the investment of investors. The special feature of "public interest" with which the Act deals in § 204 is protection of the public from unsound financial practices for the ultimate benefit of the consumer in *low cost* service, and the investing public in *sound investments.*[38]

As pointed out by the Court of Appeals in another decision which the court erroneously failed to consider applicable to the instant case, "public interest" is not the same in a pure financing matter as it is in a licensing or certification procedure:

> In making this argument, the Cooperative necessarily equates the statutory term "public interest" with that term as it is used in licensing or certification statutes. Therein lies the fallacy of its contention.[39]

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[37] Sen. Rep. No. 621, supra, Appendix, p. 59. The Court of Appeals recognized this principle (Pet.App.A at 13a, 454F.2d 941, 948), but refused to be restrained by the narrowness of the policy behind § 204.

[38] If the "public interest" concern of the FPC under § 204 extends to prevention of growth of pyramided structures and the reestablishment of holding company systems through inter-corporate ownership, such issue is wholly foreign to this case and need not be determined here.

[39] *Alabama Electric Cooperative, Inc.* v. *Securities and Exchange*

While there are substantial reasons to reach different results in construing ICC power over securities issues and that of the FPC, the same reasons do not apply when FPC powers under § 204 of the Federal Power Act are compared with those of the SEC under §§ 6 and 7 of the Public Utility Holding Company Act. The court below declined to apply the authority most nearly in point[40] to the scope of FPC responsibility under § 204 while relying on the same authority in arriving at a contrary result[41] in determining the scope of SEC responsibility under §§ 6 and 7 of the Public Utility Holding Company Act. There is every reason to believe the Congress intended the same scope and purpose in securities regulation under Titles I and II of the Public Utility Act of 1935.

Commission, 353 F.2d 905, 907 (D.C. Cir. 1965), cert. den. 383 U.S. 968 (1966).

The Supreme Court has said in a certification case under the Natural Gas Act [Federal Power Commission v. Transcontinental Gas Pipeline Co., 365 U.S. 1, 23 (1961)]:

> . . . "public convenience and necessity" connotes a flexible balancing process, in the course of which all the factors are weighed prior to final determination.

The balancing process as used for determination of a certificate of convenience and necessity is not readily adaptable to consideration of a security issue for cash. Of the host of decisions cited by the court below (Pet. App. pp. 12a-13a) for the proposition that regulatory agencies considering the "public interest" have authority or responsibility to consider anticompetitive purpose or consequence, most were certification cases. Only one, and that was *Denver & Rio Grande*, dealt with stock issuance.

The varieties of definitions and declarations of "public interest" in the statutes and determinations by the court are legion. Indeed the variation of meaning and application of "public interest" in other contexts than financing cover too broad a range and are too much a function of applicable policy to particular situations to be useful in interpreting § 204.

[40] Alabama Electric Cooperative, Inc. v. Securities and Exchange Commission, 353 F.2d 905 (D.C. Cir. 1965), cert. denied 383 U.S. 968 (1966); Alabama Electric Cooperative, Inc. v. Securities and Exchange Commission, 359 F.2d 434 (5th Cir. 1966).

[41] Pet. App. at pp. 26a and 27a.

The intent of Congress as revealed by legislative history was to grant the FPC authority under Title II as it granted the SEC authority under Title I of the Public Utility Act of 1935 namely to control the financial integrity of utility companies. For example, the committee report to the Senate stated specifically that:

> The new Part 2 of the Federal Water Power Act seeks to bring about the regional coordination of the operating facilities of the interstate utilities along the same lines within which the financial and managerial control is limited by Title I of the bill.[42]

The available evidence reflects that Congress had in mind the same limited authority regarding financing under both Titles of such Act. The Court of Appeals in the opinion below recognized and held that under Title I of the Act, the SEC could not be required by intervenors to give consideration to alleged utility operating activities from the point of view of undue restraints on competitors or potential competitors in a proceeding by the utility for permission to issue securities; in the same opinion under substantially the same circumstances the court below did require such consideration by the FPC.

From the foregoing examination of legislative history of the Federal Power Act and analysis of such Act in relation to the Interstate Commerce Act and Public Utility Holding Company Act, it is clear that the FPC was correct in its original interpretation of the scope of § 204 and that the Court of Appeals erred in rejecting such interpretation.

B. FPC Duty in a § 204 Proceeding to Consider Charges of a Prospective Sherman Act Violation Would at Most be Limited to Charges Related to Activities within FPC Jurisdiction and Subject to its Regulation.

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[42] Sen. Rep. No. 621, 74th Cong., 1st Sess., p. 18.

Cities complained that Gulf States had unlawfully engaged in litigation, public relations drives, lobbying efforts, and negotiations with government officials. The Federal Power Act does not give the FPC jurisdiction over a public utility's right to engage in such activities. If Gulf States sought to protect its business and retain its customers against the activities of competitors by expending funds to pursue lawsuits, conduct lobbying activities before Congress, appear before administrative agencies, engage in public relations drives, or conduct contract negotiations with governmental agencies or competing generating utilities, it was not required by the Federal Power Act to first obtain permission from the FPC.[43]

Cities alleged no activities subject to FPC jurisdiction under any section of the Federal Power Act. No activities were alleged relating to sale or exchange of energy and establishing physical connections, § 202(b),[44] disposition of property, consolidations and purchase of securities, § 203,[45] rates and charges, §§ 205, 206,[46] or interlocking directorates, § 305.[47]

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[43] This Court has held that publicity campaigns and litigation directed toward obtaining governmental action adverse to prospective competitors is not illegal merely because affected by an anti-competitive purpose nor is it illegal for one to seek action on laws in hope of achieving an advantage for himself and a disadvantage to competitors. *Eastern Railroad's President's Conference* v. *Noerr Motor Freight, Inc.*, 365 U. S. 127 (1961). The rule was recently reaffirmed in *California Motor Transport Co., et al* v. *Trucking Unlimited*, 92 S. Ct. 609 (decided January 13, 1972). This line of authority serves to increase the difficulty of the FPC in determining the direction and scope of actions or orders which might be appropriate if investigation of antitrust activity should be required in this case.

[44] *Id.* at § 824a(b).

[45] *Id.* at §824b.

[46] *Id.* at §§ 824d and e.

[47] *Id.* at § 825d.

The Cities sought no interconnection with Gulf States. The court below made irrelevant observations and citations in its opinion[48] which suggest that it may have assumed that this case somehow involved interconnections with Gulf States within the regulatory jurisdiction of the FPC. This was not so. The Cities did not claim they were denied additional interconnections[49] with any of the three private companies involved (being already interconnected with two of them),[50] or that they were refused the right to buy or exchange energy with any of them which might have invoked FPC jurisdiction under § 202 of the Federal Power Act.

Activities by Gulf States which Cities alleged and of which they complained were not "within the purview of the regulating power of the commission," and for that reason it would have exceeded the FPC's powers to make an effort to restrict them by attaching conditions to a § 204 order authorizing securities.[51]

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[48] e.g. quotations from § 202(a), Pet. App. A, p. 18a; reference to § 202(b), Pet. App. A, pp. 18a-19a; text at note 19, Pet. App. A, pp. 19a-20a; and text at note 20, Pet. App. A., p. 20a.

[49] R 312-19. Had interconnection been sought within the authority of the FPC, application could have been made under § 202. Had charges been made of violations under the other sections, § 306 provided a specific procedure for complaints and § 307 for investigations by the FPC of violations of the chapter.

[50] R 58.

[51] *U. S.* v. *Chicago, M., St., P & P R. Co.*, 282 U. S. 311 (1931). In its opinion in that Interstate Commerce Act case, at page 324, the Supreme Court said:

> By subdivision (3) of § 20a the commission is empowered to make its grant of authority to issue securities upon such conditions as the commission may deem necessary or appropriate in the premises. The power to impose such conditions, however, is not unlimited and may not be exercised arbitrarily or (since Congress cannot delegate any part of its legislative power except under the limitation of a prescribed *Standard Union Bridge Co.* v. *United States*, 204 U.S. 364, 384, 385, 27 S. Ct. 367, 51 L. Ed. 523), unless there be found substantial warrant

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Further, the FPC had no power to enforce the Sherman Act or even to decide if it had been violated. It could not *judge* prospectively whether the proceeds of a security issue would, unless restrained, be used to violate antitrust laws.[52] The FPC had no power directly to enjoin conduct thought to be illegal under the Sherman Act. It should not, by indirection, enjoin speculated antitrust violation by the ruse of resorting to a § 204 order to impose conditions on the use of cash generated by the sale of securities.

Even though the powers of the ICC are plenary and those of the FPC limited and even though the following quotations involved *merger,* not stock issue, the quotation from an opinion of the Supreme Court dealing with the ICC seems useful here:

> Thus, here, the Commission has no power to enforce the Sherman Act as such. It cannot decide definitely whether the transaction contemplated constitutes a restraint of trade or an attempt to monopolize which is forbidden by that Act. The Commission's task is to enforce the Interstate Commerce Act and other legislation which deals specifically with transportation facili-

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for the conditions in the applicable standards established by the provisions of the act relating to such securities.

[52] *McLean Trucking Co.* v. *United States,* 321 U.S. 67 (1944).

The Federal Power Act contains no authority for the FPC to expand the scope of § 204 to cover such prospective consequences. If it did, then it would seem to follow that the FPC would also have authority over and responsibility for other prospective unlawful consequences which might flow from pursuit or fulfillment of the immediate purpose of a security issue. For example, if construction of facilities were the immediate purpose of the security issue, construction and the completed project could produce violations of federal equal opportunity, wage and hour, safety and pollution laws as well as antitrust laws. (See NAACP, FPC Docket No. R-447, Opin. No. 623, July 11, 1972). This was clearly not intended under § 204. The FPC's authority and responsibility must end with application of the statutory criteria to the *immediate purpose* of the security issue, and not prospective and remote consequences.

> ties and problems. That legislation constitutes the immediate frame of reference within which the Commission operates; and the policies expressed in it must be the basic determinants of its action.[53]

The Federal Power Act is silent as is the Sherman Act on any powers of the FPC to enforce the latter. Congress did not intend that the FPC should attempt to evaluate prospective activities in Sherman Act terms as a part of a § 204 proceeding.

Thus it is clear that the Cities complained of no activity which the FPC had the power to regulate or the threshold duty to consider prior to action under § 204 in this case.

C. Exclusion of Antitrust Considerations from § 204 Proceedings Involving Issuance of Securities for Cash at Competitive Bidding Serves the Congressional Purpose and the Public Interest.

The 1970 and 1971 Annual Reports of the FPC reflect that outstanding securities of the nation's privately owned electric utilities increased $4.39 billion in calendar 1969, and $7.21 billion in 1970, and that during the FPC 1970 fiscal year it processed 39 applications for issuance of securities valued at nearly $1.5 billion, and in 1971, 43 applications for nearly $1.8 billion.[54] Gulf States alone issued long-term securities valued at approximately $88 million in 1970; $75.2 million in 1971. The FPC's concern for the continually increasing needs of such companies to obtain financing for the construction of generating and transmission facilities including the cost of atomic facilities, conversion of facilities necessitated by fuel shortages, and

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[53] McLean Trucking Co. v. United States, 321, U.S. 67, 79-80.

[54] FPC 1970 Annual Report to Congress, pp. 21, 25; 1971 Report, pp. 18, 21. Volumes cited of course exclude securities exempted from FPC regulation because of regulation by State Securities Commissions or for other reasons.

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anti-pollution equipment has caused it to institute new rules for compilation of forecasts of financing requirements.[55]

Long-term securities are customarily issued for cash at competitive bidding under FPC Regulation § 34.1a(b) for the purpose of refunding short-term securities theretofore issued [either under authority of the FPC or under the exemption in § 204(c)] to provide interim financing of construction and other utility operations, or to obtain funds for prospective construction and operations.

Reports filed with the FPC on bidding for securities show that the initial market for utility securities is found principally in wholesaling investment houses. The wholesalers customarily resell the securities to the investing public, including pension funds, institutional investors, and private investors. The willingness of wholesalers to purchase utility securities and the continued availability of the public market for such securities is directly dependent upon the financial integrity of the utility business, public confidence in the operation and regulation of utilities, and maintenance of an orderly market, which includes dependable marketing timetables.

Prospects of selling long-term securities at the lowest cost of money are enhanced by compressing advance planning to the shortest time possible so that when favorable marketing conditions are observed or anticipated, the sale can be consummated while such conditions continue. After all determinations as to type of security to be issued, terms, amount, and timing have been made and essential documents prepared, then assuming expeditious action by regulatory agencies, lead time of from 45 to 90 days from commencement of preparation to file with a regulatory

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[55] FPC Notice of Proposed Rulemaking, Docket No. R 443, May 26, 1972.

agency may reasonably be anticipated.[56] The longer lead time required, the more risk of market misjudgment with its resultant effect on cost of capital, and thus cost of service.

The FPC records show, so far as has been determined, that prior to the intervention sought by the Cities in this case, no petition to intervene or protest in a financing application under § 204 had ever occurred. No threat had ever before been posed to FPC control over its processing of applications to maintain financial time schedules and orderly marketing under § 204 applications.

Recognition of the importance of expedition and commitment to a policy of adhering to time schedules in the administration of §204 of the Act was made by the FPC

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[56] Priest, *Principles of Public Utility Regulation*, Vol. 1, pp. 462-3 (1969).

"Thus the agenda that must be followed by the average utility enterprise will run from six weeks to two months or longer, even on the assumption that bonds, debentures and stock will all be sold at the same time.

"If, for example, approval of the proposed securities must be obtained from the Federal Power Commission under the Federal Power Act or from the Securities and Exchange Commission under the Public Utility Holding Company Act, four weeks should be allowed between the filing of the utility's application and issuance of the Commission's order. Three to four weeks normally will be required to complete the process of registration under the Securities Act of 1933. Not less than the same amount of time will elapse between the submission of petitions to state regulatory authorities and formal action by them. Then another week will be required to complete and execute contracts for the purchase of the securities, physically to issue bonds, debentures or stock, and to agree upon the closing memorandum, opinions of counsel and sundry other necessary papers. If particular securities have been listed on a national securities exchange, new issues must be registered under the Securities Exchange Act of 1934, not a difficult process if there has been compliance with the 1933 Act. No fewer than two meetings of the company's board of directors must be held and the minutes of those meetings, as well as forms of securities and other documents, will be subjected to searching scrutiny. Certain of the periods will run concurrently, but if the first application to a regulatory agency is filed on the 10th of March, all gears must mesh if the securities are to be delivered and certi-

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in *Pacific Power & Light Co.*,[57] and abided in the present proceeding. The FPC explained its holding in *Pacific Power & Light Co.* in these terms:

> It should also be observed that procedures for considering security issues must be expeditious if, in view of changing marketing conditions, utilities are to be able to raise the money needed to carry out their responsibilities .... It would be a serious abuse of power for this commission to require a hearing and thus delay a $55 million security issue, merely because a small fraction of the proceeds is to be devoted to the construction of facilities which, at extra cost, are susceptible of improvement to enlarge their capacity for a future use which may not materialize. It would be an even more serious abuse of power were we to hold up this security issue merely because questions relative to the disposition of Bonneville's power are politically controversial.[58]

Experience since the Congress enacted the Federal Power Act in 1935 has justified provision for uncomplicated, easily applied standards for the timely issuance of securities to fund new construction for expanding electric loads.[59]

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fied checks actually received on April 30th. Incidentally, the more important corporate papers which must be prepared, prayed over and approved in the consummating of any substantial financing make a volume as thick as a modern unabridged dictionary."

[57] 27 FPC 623 (1962).

[58] *Id.* at 630.

[59] "Since World War II, the problem of new capital has been, and will continue to be, compellingly urgent for public utility managements. Railroads may not enlarge their trackage significantly and may continue to rely largely on internal resources and the ubiquitous equipment trust to finance additional and more efficient rolling stock. But the electric, natural gas, communications, and water industries, as well as the airlines, must go to the investment fraternity for staggering amounts. . . . our economy may not generate enough savings to do the job. Competition for the investor's dollar will remain intense . . .

"With some exceptions, utility service is being provided at

Adherence to the overriding Congressional purpose of § 204 by excluding anticompetitive considerations in a pure financing proceeding such as this case simplifies the administrative process under § 204 and avoids wasteful duplication of administrative effort. In this case, there were a number of procedures available for appropriate consideration of the Cities' complaints. The Justice Department had authority to investigate, either on its own intiative or upon complaint by the Cities, FPC, or others, and, if called for, bring action with regard to the activities alleged.[60] The Cities could have instituted private actions under state and federal laws, not being under restraints comparable to those imposed on private parties by § 16 of the Clayton Act[60a] in matters as to which agencies such as the ICC

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bargain-counter rates and in tremendously expanding volumes, requiring huge expenditures for the improvement and expansion of physical facilities. The airlines, electric, telephone and natural gas companies probably have expanded more rapidly than any of their utility rivals . . .

"Growth of the electric utility industry has been only a little less spectacular. Between 1950 and 1966, electric generating capacity in the United States increased three and one-half times, or from 69,000,000 to 246,000,000 kilowatts, with 620,000,000 kilowatts expected in 1980. New construction put in service by investor-owned companies was up from $26.7 billion in 1950 to $50 billion in 1967. Total electric company plant account stood at $71.3 billion in the latter year.

". . . the new capital requirements of the utility industry in the next ten years will call for extraordinary effort. The obvious reasons are (1) that regulated public utilities literally cannot produce as much cash through retained earnings as unregulated industrial enterprises and (2) that the utilities, in any event, need a much larger investment per dollar of annual revenue than the characteristic industrial." Priest, *Principles of Public Utility Regulation*, Vol. 1, pp. 451-2 (1969).

[60] As noted by the FPC in its Memorandum for the Federal Power Commission in Opposition to Petitioners' Application for Writ of Certiorari filed with this Court, the Justice Department has in fact instituted an investigation of the activities covered by the Cities, allegations by issuance of a Civil Investigative Demand to the utility companies alleged to be involved.

[60a] 15 USC § 26. Significance of such restraints is discussed in *Denver & Rio Grande* at p. 502.

are obligated to enforce the Act. The Cities could have sought remedy under § 202 if they had sought an interconnection or filed a direct complaint under § 306 of the Federal Power Act if they claimed any violation of such Act.[61]

The antitrust issues raised by the Cities fell within areas of activity not subject to FPC regulation, involving difficult issues of antitrust law the FPC was not authorized to adjudicate. Consideration of such matters under § 204 would have merely added burden, delay, and expense to the proceeding without reasonable benefit or prospect for meaningful result for the Cities or the FPC.

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[61] Such was the procedure expressly recommended by the FPC in an analogous situation. See *Western Mass. Elec. Co. Proj. No. 1889*, 39 FPC 723, 736, 738 (1968), rehearing denied, 40 FPC 296, aff'd.; *Munic. Elec. Assn. of Mass.* v. *FPC*, 414 F.2d 1206 (D.C. Cir. 1969).

In two financial proceedings of Gulf States initiated subsequent to the instant proceeding (FPC Docket Nos. E-7663 and E-7682), faced with substantially identical protests and petitions by the Cities and deferring to the mandate of the Court of Appeals that the allegations of the Cities be heard either in the § 204 proceeding or in another proceeding, the FPC severed such protests for investigation and hearing by deeming the filing by the Cities to be in the nature of a complaint under § 306 of the Federal Power Act. The adoption of this mechanism by the FPC is supported by principles recently affirmed by this Court in *Federal Power Commission* v. *Louisiana Power & Light Co.*, ... U.S. ..... No. 71-1016, June 7, 1972. In such case involving a similar statute the Court accepted the need for the FPC to be flexible and free to make "pragmatic adjustments which may be called for by particular circumstances" in circumstances not unlike those in the instant case in that "delay incident to determination" was a significant factor. While the procedure so adopted by the FPC has been successful in accomplishing a proper accommodation between the policies controlling it in the financing proceedings and any duties it may be shown to have by the Cities with regard to their allegations, the threat of unreasonable interference with or delay of public utility financing under § 204 proceedings and imposition of improper responsibilities on the FPC under § 204 by the mandate of the Court of Appeals should be removed by this Court.

II. If the FPC Had Jurisdiction to Investigate Sherman Act Violations in § 204 Proceedings, If It Saw Fit, Its Refusal To Do So in This Case Was Not Error.

A. The FPC Finding That the Matters Asserted and Activities Alleged by the Cities Were Irrelevant to the Purpose of Issuing Bonds to Refund Short-Term Indebtedness Theretofore Authorized by the FPC Was a Fact Finding or Conclusion Which the Court of Appeals Below Was Not Free to Set Aside or Disregard.

The FPC did not ignore or fail to consider the allegations of the Cities in this case. The Cities' pleadings with exhibits were extensive. The FPC granted the Cities' request to intervene[62] to allow consideration of their petition.[63]

After consideration of the entire record, the FPC found:

(6) The matters asserted and activities alleged in the filed protest and petition to intervene by the Cities of Lafayette and Plaquemine, Louisiana, are irrelevant to the purpose of issuing bonds to refund short-term indebtedness heretofore authorized by this Commission.

(7) The matters asserted and activities alleged in the filed protest and petition to intervene by the Cities of Lafayette and Plaquemine, Louisiana, do not raise any issue which required a hearing.[64]

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[62] Gulf States urged below that the FPC deny intervention since the Cities failed to make substantial factual allegations of injury to their interests which could result from FPC orders authorizing issuance of bonds for repayment of short-term notes. See *Sierra Club* v. *Morton*, 92 S. Ct. 1361 (1972); *Flast* v. *Cohen*, 392 U.S. 83, 102 (1968).

[63] R. 303, finding (5).

[64] R. 303.

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The FPC explained:

> **The requested approval of the issuance of the Bonds allow the Company only to change the form of a portion of its outstanding indebtedness, it does not call for the initiation of any construction or other program by the Company which might effect [sic] the interest of the Petitioners. The alleged violations which petitioners attempt to raise in this proceeding are irrelevant to a requested authorization of securities. There is no relief that the Commission can order in authorizing the issuance of the Bonds for refinancing purposes that would have any effect on the interest of the petitioners, or solve any of the problems outlined by them.[65]**

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[65] R. 302.

For the Cities to be able to successfully contest the refinancing issuance on the theory that the funds might be traceable through the refinancing back to the expenditures authorized in the prior proceeding, or that the refinancing made funds available to Gulf States which would otherwise have to be replaced, would permit the Cities to thereby contest an order of the FPC which has become final and is no longer subject to judicial review. Such earlier order in FPC Docket No. E-7509 had authorized the issuance of short-term notes under Section 204(a) of the Act in amounts not exceeding an aggregate of $80 million outstanding at any one time. Item J of Gulf States' application in E-7509 stated that the proceeds from the short-term notes would be added to the general funds of Gulf States to be used, among other things, to provide part of the interim funds for construction expenditures. In compliance with FPC Regulation § 34.2(j)(1), a summary of estimated expenditures for 1969 and 1970 relating to a total construction program of $378,685,000 was made and the item by item detailed description of such construction program was included as Exhibit Q of the E-7509 application. Such Exhibit Q consisted of thirty-nine pages of detailed descriptions of the facilities to be constructed, including all (eighty-four) specific projects costing over $100,000 each, detail of special and blanket requisitions, and general and steam plant projects. In addition, as Exhibit P to such application, a map was filed with detailed indication of the location of each construction item. No protest, petition to intervene, or other complaint was filed in such proceeding under Docket No. E-7509, and the order of the FPC was entered approving the issuance of such short-term notes for the purposes indicated.

Further, the FPC also found that the statutory criteria of §204 were satisfied.[66] The FPC had before it all of the information called for under FPC Regulations (Part 34) upon which it customarily based its determinations in §204 proceedings as well as all other information concerning Gulf States, financial and otherwise, in its public records. This included the undisputed facts that approximately $55,000,000 short-term notes were outstanding and maturing, that the FPC order limited short-term financing to $80,000,000, that construction projects had been approved for estimated expenditures during 1969 and 1970 of $378,685,000 (see note 65), and that funds internally generated were not sufficient to fund the approved portion of the construction program and repayment of short-term indebtedness. The record further reflected that proceeds from the bond issue were to be used to pay off the maturing short-term notes.[67]

The conclusions of the FPC in findings (4), (5), (6) and (7) were based on reasonable judgment applied to facts not disputed by the contending parties and accompanied by full explanation. The Court of Appeals erred in rejecting such conclusions.[68]

B. As Intervenors in a § 204 Proceeding Cities Would Not Have Been Entitled to a Hearing Even if They Had Raised Substantial and Relevant Issues.

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[66] R. 303, finding (4).

[67] The representation as to the purpose of use of proceeds from the issue was also made in the registration statement approved by the SEC (R. 377), which was filed to comply with applicable securities law (Securities Act of 1933).

[68] Federal Power Act, § 313(b), App. G. p. 54a, 55a; *Gainesville Utilties Dept.* v. *Florida Power Corp.*, 402 U.S. 515 (May 24, 1971); *Federal Power Commission* v. *Florida Power & Light Co.*, 92 S.Ct. 637 (January 12, 1972). That there is no dispute concerning the evidentiary facts does not permit Court to substitute its judgment for that of the agency. *Gray* v. *Powell*, 314 U.S. 402, 412 (1941). On undisputed facts, the Court is free to disturb the Commission's

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Section 204(a) forbids a public utility to issue any security until, upon application, the FPC authorizes it. Section 204(a) does not provide for *notice* of the application nor does any other part of §204 make provision for notice of any proceeding under the section. *Hearing* is mentioned in the section only in §204(b) which provides the FPC, after *opportunity* for hearing, may grant any application under the section *in whole or in part* and with such *modifications* and *upon such terms and conditions* as it may find necessary or appropriate, and from time to time, after *opportunity* for hearing by supplemental order *modify* the provisions of any previous order. The logical meaning of §204(b) is that the *applicant* shall have an opportunity to be heard. This construction of §204 is supported by comparison with other sections of the Federal Power Act and the Interstate Commerce Act. Section 20a of the Interstate Commerce Act *permits a hearing* if the ICC sees fit, but *requires notice*[69] to governors and to the state commissions (omitting, however, the provision for notice "to such other persons as it may deem advisable" found both in §5 of the Interstate Commerce Act and § 203 of the Federal Power Act).

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finding only if it lacks any rational or statutory foundation. *Securities and Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194, 207 (1947). A reviewing court cannot set aside an inference because it believes an opposite inference to be more reasonable. If supported by evidence and not inconsistent with law, the agency's finding is conclusive. *Cardillo* v. *Liberty Mutual Insurance Co.*, 330 U.S. 469, 477-8 (1947).

[69] Judge Augustus Hand, in a three judge court opinion in 1921 shortly after addition of § 20a to the Interstate Commerce Act in 1920, said of it:

> Section 268(a) of the Railroad Bill, which regulates the issue of security by common carrier, so far as relevant, provides merely that the Interstate Commerce Commission may authorize a carrier to issue new shares or bonds. This it must do, Section 272(6), upon notice to the Governor of each state through which the carrier passes. The state authorities may oppose and the Commission may hold hearings if it sees fit. Apparently no one else may object. The purpose of these provisions of law is only to prevent overissues of securities and the Commission had no jurisdiction to determine

This is in contrast to the elaborate provisions in §5 (acquisition of control) of the Interstate Commerce Act for notice to governors of states, and carriers, including motor carriers in certain cases, and the requirement of "reasonable opportunity for interested parties to be heard."[70] Further in the same § 5:

> If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for hearing; and *a public hearing shall be held* in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest.[71] (Emphasis supplied.)

Section 203[72] (purchase or other acquisition of the stock of another utility) of the Federal Power Act may be readily equated with § 5 of the Interstate Commerce Act. Like § 5, § 203 provides for *notice* to governors of states where the physical properties are situated and in addition requires notices to State Commissioners and "to such other persons *as it may deem advisable.*" (Emphasis supplied.) It also provides for approval of the application only after *notice and opportunity for hearing.* It is reasonable to read, "opportunity for hearing" in this context as opportunity to the *applicant* and to *persons entitled to notice.* This contrasts with § 204 which requires no *notice* whatever to state commissions or otherwise and makes no explicit provision for participation of any parties other than the applicant in the proceeding. In such context it is reasonable to read "opportunity for hearing" in § 204(b) as

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whether the property received will belong to the carrier when received, or whether there are liens upon it." *Miller* v. *United States* (1921) 277 F. 95, 97.

[70] 49 U.S.C. §5(2)(b).

[71] *Ibid.*

[72] 16 U.S.C. §824b.

meaning opportunity *only* for *applicant* to be heard. Such opportunity for hearing was no doubt supplied to insure constitutional protection of due process to applicants.[73]

Section 308 of the Federal Power Act deals with *hearings* under the chapter, and also with *proceedings* before the FPC. Section 308(b) provides that both hearing and proceedings under the chapter shall be governed by rules of practice and procedure to be adopted by the FPC. By its terms § 308 does not require the FPC to afford an opportunity for hearing to anyone . In § 308(a) it is provided:

> In any proceeding before it the Commission *may* admit as a party . . . any municipality . . . or any competitor of a party to such proceeding . . . (Emphasis supplied.)

The FPC may have relied on this section to admit Cities as parties to the proceedings for the stated purpose of considering the content of their petition.[74]

For the reasons stated, Cities were not entitled to a hearing even though admitted as parties to the proceeding.

Even if Cities might otherwise have been entitled to a hearing, none was required because, on the record, the FPC's ultimate decision in this case would not have been assisted by the receipt of evidence.[75]

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[73] *Morgan* v. *United States,* 304 U.S. 1 (1938).

[74] R. 303.

[75] *Denver Union Stockyard Co.* v. *Producers Livestock Marketing Assn.,* 356 U.S. 282 (1958); *United States* v. *Storer Broadcasting Co.,* 351 U.S. 192 (1956); *Pennsylvania Gas & Water Co.* v. *FPC,* No. 71-1126, ... F.2d ..... (D.C. Cir. May 2, 1972); *Groendyke Transport, Inc.* v. *Davis,* 406 F.2d 1158 (5th Cir. 1969), cert. den. 394 U.S. 1012.

CONCLUSION

For the reasons stated the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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August, 1972

APPENDIX A

Federal Power Act § 204, 16 USC, § 824c

§ 824c. Issuance of securities; assumption of liabilities; filing duplicate reports with Securities and Exchange Commission

(a) No public utility shall issue any security, or assume any obligation or liability as guarantor, indorser, surety, or otherwise in respect of any security of another person, unless and until, and then only to the extent that, upon application by the public utility, the Commission by order authorizes such issue or assumption of liability. The Commission shall make such order only if it finds that such issue or assumption (a) is for some lawful object, within the corporate purposes of the applicant and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the applicant of service as a public utility and which will not impair its ability to perform that service, and (b) is reasonably necessary or appropriate for such purposes. The provisions of this section shall be effective six months after Aug. 26, 1935.

(b) The Commission, after opportunity for hearing, may grant any application under this section in whole or in part, and with such modifications and upon such terms and conditions as it may find necessary or appropriate, and may from time to time, after opportunity for hearing and for good cause shown, make such supplemental orders in the premises as it may find necessary or appropriate, and may by any such supplemental order modify the provisions of any previous order as to the particular purposes, uses, and extent to which, or the conditions under which, any security so theretofore authorized or the proceeds thereof may be applied, subject always to the requirements of subsection (a) of this section.

(c) No public utility shall, without the consent of the Commission, apply any security or any proceeds thereof to any purpose not specified in the Commission's order, or supplemental order, or to any purpose in excess of the amount allowed for such purpose in such order, or otherwise in contravention of such order.

(d) The Commission shall not authorize the capitalization of the right to be a corporation or of any franchise, permit, or contract for consolidation, merger, or lease in excess of the amount (exclusive of any tax or annual charge) actually paid as the consideration for such right, franchise, permit, or contract.

(e) Subsection (a) of this section shall not apply to the issue or renewal of, or assumption of liability on, a note or draft maturing not more than one year after the date of such issue, renewal, or assumption of liability, and aggregating (together with all other then outstanding notes and drafts of a maturity of one year or less on which such public utility is primarily or secondarily liable) not more than 5 per centum of the par value of the other securities of the public utility then outstanding. In the case of securities having no par value, the par value for the purpose of this subsection shall be the fair market value as of the date of issue. Within ten days after any such issue, renewal, or assumption of liability, the public utility shall file with the Commission a certificate of notification, in such form as may be prescribed by the Commission, setting forth such matters as the Commission shall by regulation require.

(f) The provisions of this section shall not extend to a public utility organized and operating in a State under the laws of which its security issues are regulated by a State commission.

(g) Nothing in this section shall be construed to imply any guarantee or obligation on the part of the United States in respect of any securities to which the provisions of this section relate.

(h) Any public utility whose security issues are approved by the Commission under this section may file with the Securities and Exchange Commission duplicate copies of reports filed with the Federal Power Commission in lieu of the reports, information, and documents required under section 77g and section 781 and 78m of Title 15. June 10, 1920, c. 285, § 204, as added Aug. 26, 1935, c. 687, Title II, § 213 49 Stat. 850.

INDEX

	Page
Opinion Below	1
Jurisdiction	2
Question Presented	2
Statutes Involved	2
Statement	3
1. The Proceeding Before The Commission	3
2. The Court Of Appeals Decision	5
Summary Of Argument	7
Argument:	
The Federal Power Commission Should Not Be Required To Delay Public Utilities' Financing In Order To Consider Antitrust Allegations Which It Can Fully Consider And Remedy In Other Proceedings Under The Federal Power Act	11
A. The Commission Should Be Permitted To Consider Antitrust Allegations Under The Federal Power Act In Proceedings Where Such Allegations Are Directly Related And Where The Commission Can Order An Appropriate Remedy	11
B. Section 204 Of The Federal Power Act Contains No Requirement That The Commission Consider Antitrust Allegations When Authorizing The Issuance Of Securities	20
Conclusion	27
Appendix	29

CITATIONS

Cases: Page

Black Hills Power & Light Co., 28 FPC 1121 21
Black Hills Power & Light Co., 31 FPC 1605 21
California v. *Federal Power Commission*, 369 U.S. 482 19
Carter v. *American Tel. & Tel. Co.*, 365 F.2d 486, certiorari denied, 385 U.S. 1008 ..... 13, 20
Cities of Statesville v. *Atomic Energy Commission*, 441 F.2d 962 ..... 13, 24
City of Pittsburgh v. *Federal Power Commission*, 237 F.2d 741 13
Commonwealth Edison Co. and Central Illinois Electric and Gas Co., 36 FPC 927, affirmed *sub nom. Utility Users League* v. *Federal Power Commission*, 394 F.2d 16, certiorari denied, 393 U.S. 953 18
Denver & Rio Grande Western R. R. v. *United States*, 387 U.S. 485 ..... 5, 8, 13, 17, 18, 25
Federal Communications Commission v. *Pottsville Broadcasting Co.*, 309 U.S. 134 16
Federal Communications Commission v. *Schreiber*, 381 U.S. 279 16
Federal Maritime Commission v. *Aktiebolaget Svenska Amerika Linien*, 390 U.S. 238 12
Idaho Power Co., 28 FPC 967 21
Municipal Electric Assn. of Massachusetts v. *Securities and Exchange Commission*, 413 F.2d 1052 6

Cases—Continued Page

Northern Natural Gas Co. v. *Federal Power Commission*, 399 F.2d 953 13
Pacific Power & Light Co., 27 FPC 623 ..... 6, 21, 25
Pan American World Airways v. *United States*, 371 U.S. 296 12
Udall v. *Tallman*, 380 U.S. 1 22
U. S. Navigation Co. v. *Cunard S.S. Co.*, 284 U.S. 474 12-13
United States v. *American Trucking Ass'ns*, 310 U.S. 534 ..... 19, 22, 24
United States v. *El Paso Natural Gas Co.*, 376 U.S. 651 20

Statutes:

Atomic Energy Act, 1954:
Section 104(b), 42 U.S.C. § 2134 (b) 24
Section 105, 42 U.S.C. § 2135 12

Clayton Act, 1914:
Section 2, 15 U.S.C. § 13 ..... 3, 17
Section 3, 15 U.S.C. § 14 ..... 3, 17
Section 7, 15 U.S.C. § 18 ..... 3, 17
Section 8, 15 U.S.C. § 19 ..... 3, 17
Section 11, 15 U.S.C. § 21 2

Federal Power Act (Act of June 10, 1920), 41 Stat. 1063, 16 U.S.C. §§ 791-823, as subsequently amended (46 Stat. 797) including amendments and additions and change of name by Title II of the Public Utility Act of 1935 (Act of August 26, 1935, c. 687, 49 Stat. 838, 16 U.S.C. §§ 791a-825r):

Statutes—Continued

	Page
Section 201, 16 U.S.C. § 824	11
Section 202, 16 U.S.C. § 824a	2, 14, 15
Section 203, 16 U.S.C. § 824b	2, 14, 18, 26
Section 204, 16 U.S.C. § 824c	2, 3, 5, 7, 8, 9, 10, 13, 16, 17, 19, 20, 21, 22, 23, 26, 27
Section 204(a), 16 U.S.C. § 824c (a)	20
Section 204(f), 16 U.S.C. § 824c (f)	8
Section 205, 16 U.S.C. § 824d	2, 14
Section 206, 16 U.S.C. § 824e	2, 14
Section 207, 16 U.S.C. § 824f	2, 14
Section 306, 16 U.S.C. § 825e	2, 15
Section 307, 16 U.S.C. § 825f	2, 15
Section 313, 16 U.S.C. § 825*l*	2
Section 313(b), 16 U.S.C. § 825*l*(b)	2
Section 318, 16 U.S.C. § 825q	8
Interstate Commerce Act, 1887:	
Section 5(2)(a)(i), 49 U.S.C. § 5 (2)(a)(i)	2, 18
Section 20a, 49 U.S.C. § 20a	2, 17, 18
Section 20a(2), 49 U.S.C. § 20a(2)	5
Public Utility Holding Company Act, 1935 (Title I of the Public Utility Act of 1935):	
Section 2, 15 U.S.C. § 79b(a)(7)	11
Section 6, 15 U.S.C. § 79f	3, 26
Section 7, 15 U.S.C. § 79g	3, 6, 26
Section 9, 15 U.S.C. § 79i	3, 26
Section 10, 15 U.S.C. § 79j	3, 6, 26

Miscellaneous: Page

79 Cong. Rec. 10379 (remarks of Congressman Lea of California) 23
79 Cong. Rec. 10362-5 (remarks of Congressman Wolverton of New Jersey) 26, 27
3 Davis, *Administrative Law* § 19.05 20
Federal Trade Commission, *In Response to Sen. Res. No. 83, Monthly Reports on the Electric Power and Utilities Inquiry*, S. Doc. No. 92, Pts. 1-84II, 70th Cong., 1st Sess. (1928-36) 11
Federal Trade Commission, *Summary Report on Economic, Financial, and Corporate Phases of Holding and Operating Companies of Electric and Gas Utilities*, S. Doc. No. 92, Pt. 72-A, 70th Cong., 1st Sess. 23
H. Rep. No. 1318, 74th Cong., 1st Sess. 23
Oster, "Economic Dimensions of the Seventies: Their Implications for the Utilities," in *Utility Regulation During Inflation* (Seminar on the Economics of Regulated Industries During Inflation, 2d, Occidental College, 1970) 25
S. Rep. No. 621, 74th Cong., 1st Sess. 22

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1178

GULF STATES UTILITIES COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION,
CITY OF LAFAYETTE, LOUISIANA,
CITY OF PLAQUEMINE, LOUISIANA, RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION IN SUPPORT OF PETITIONER

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-29a) [1] is reported at 454 F.2d 941.

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[1] "Pet. App." references are to the appendix to the petition filed by Gulf States Utilities Company, No. 71-1178. "J.A." references are to the Joint Appendix in the proceeding before the Court below.

JURISDICTION

The judgment of the court of appeals (Pet. App. 30a) was entered on October 12, 1971. The court of appeals' order denying rehearing (Pet. App. 31a) was issued December 15, 1971. The petition for a writ of certiorari was filed on March 11, 1972. On May 30, 1972, this Court granted the petition seeking review of the judgment of the court of appeals. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Section 313(b) of the Federal Power Act, 16 U.S.C. § 825*l*(b).

QUESTION PRESENTED

Whether the Federal Power Commission should be required to delay public utilities' financing in order to consider antitrust allegations which it can fully consider and remedy in other proceedings under the Federal Power Act.

STATUTES INVOLVED

Sections 202, 203, 204, 205, 206, 306, 307, and 313 of the Federal Power Act, 16 U.S.C. §§ 824a, 824b, 824c, 824d, 824e, 825e, 825f, and 825*l*, and Section 11 of the Clayton Act, 15 U.S.C. § 21, are set forth at Pet. App. 43a-59a. The following statutes are set forth in this brief's Appendix *infra*, pp. 29-62: Section 207 of the Federal Power Act, 16 U.S.C. § 824f; Sections 5(2)(a)(i) and 20a of the Interstate Commerce Act, 49 U.S.C. §§ 5(2)(a)(i) and 20a; Sections 6, 7, 9, and 10 of the Public Utility Holding

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Company Act of 1935, 15 U.S.C. §§ 79f, 79g, 79i, and 79j; and Sections 2, 3, 7, and 8 of the Clayton Act, 15 U.S.C. §§ 13, 14, 18, and 19.

STATEMENT

This case involves an order of the Federal Power Commission (Commission) issued pursuant to Section 204 of the Federal Power Act, 16 U.S.C. § 824c, authorizing Gulf States Utilities Company (Gulf States) to issue 30 million dollars of first mortgage bonds. The order was issued without a hearing on allegations that Gulf States earlier had engaged in anti-competitive conduct and that such conduct would be financed or refinanced through the proposed sale of bonds. The Court below remanded the Commission's decision and held that the Commission is required to consider antitrust issues in a proceeding under Section 204 before authorizing a public utility's securities issuance, unless it denies or defers consideration of such issues for reasons clearly stated.

1. The Proceeding Before The Commission

On October 12, 1970, Gulf States, a public utility subject to the Commission's jurisdiction, filed under Section 204 an application proposing to sell 30 million dollars of first mortgage bonds at competitive bidding (J.A. 1-52). The application stated that the proceeds from the issuance would be used "to refund and pay off part of its commercial paper and short-term notes to banks to be outstanding as of date of issuance."

(J.A. 5). On October 16, 1970, the Commission noticed the application and provided opportunity for the filing of protests and petitions to intervene (J.A. 53).

On November 2, 1970, the Cities of Lafayette and Plaquemine, Louisiana (Cities), filed a protest and petition to intervene (J.A. 54-160), alleging that Gulf States in concert with Louisiana Power & Light Company (LP&L) and Central Louisiana Electric Company (CLECO) (Companies) had engaged in activities "apparently violative of the antitrust laws, the Federal Power Act, and the Public Utility Holding Company Act of 1935," and alleging that such activities would be "financed or refinanced" by the proposed sale of bonds (J.A. 56). The activities complained of included litigation before federal and state courts and the Louisiana Public Service Commission, lobbying campaigns in Congress and the Louisiana legislature, and a statewide public relations campaign (J.A. 71-75), in opposition to the grant of a Rural Electric Administration (REA) loan to the Louisiana Electric Cooperative (LEC) for the construction of a generating station and transmission line (J.A. 71).[2] Cities further alleged that such activities delayed advancement of funds by REA for five years, resulting in the loan's inadequacy to cover the cost of transmission lines as well as generating facilities. Cities alleged that this left LEC to negotiate with the Companies for transmission service and that the

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[2] Cities' interest was based on a 1968 pooling and interconnection agreement among LEC, Cities, and Dow Chemical Company (Dow) (J.A. 81-117).

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Companies presented only restrictive contract proposals in such negotiations (J.A. 62-5).

On November 12, 1970, Gulf States filed an answer denying any violation of antitrust laws, the Federal Power Act, or the Public Utility Holding Company Act, and contending that Cities' allegations were outside the scope of proceedings under Section 204 (J.A. 165-76).

By order dated December 3, 1970, the Commission granted Cities' intervention, found the activities alleged by Cities to be irrelevant to Gulf States' purpose of issuing bonds to refund short-term inbebtedness, denied Cities' request for a hearing, and authorized the proposed issuance and sale of bonds (Pet. App. 32a-37a).[3] On December 16, 1970, Cities filed an application for rehearing (J.A. 188-95), which was denied by the Commission on January 13, 1971 (Pet. App. 41a- 42a).

2. The Court Of Appeals Decision

On review, the Court below remanded the order of the Commission as "plainly inconsistent with its duties as developed in *Denver & Rio Grande*" (Pet. App. 16a). In *Denver & Rio Grande Western R.R.* v. *United States*, 387 U.S. 485, this Court held that the ICC is required, as a general rule, to consider the control and anticompetitive consequences before approving stock issuances under Section 20a(2) of the Interstate Commerce Act, 49 U.S.C. § 20a(2). The

[3] By supplemental order dated December 9, 1970, the Commission approved as reasonable the proposed price and interest rate of the bonds (Pet. App. 38a-40a).

Court below rejected the Commission's interpretation, first articulated in *Pacific Power & Light Company*, 27 FPC 623, that the scope of its authority under Section 204 is limited to consideration of issues concerning the financial integrity of the applicant and its ability to perform its public utility responsibilities (Pet. App. 16a-19a). Recognizing that "security issues to provide funds for a utility's construction must be decided in a time frame much more limited than often contemplated for antitrust litigation," the Court below indicated that the Commission has a broad discretion to approve a securities issuance while reserving decision on or deferring consideration of the antitrust issues until a subsequent proceeding (Pet. App. 22a-23a).

The Court below consolidated this case with its review of two SEC orders approving security issuances by LP&L without a hearing on Cities' allegations of antitrust violations by LP&L similar to those raised in the instant case. While remanding the FPC's order, the Court affirmed the SEC orders approving LP&L's security issuances under Section 7 of the Public Utility Holding Company Act, 15 U.S.C. § 79g. Distinguishing its earlier *Municipal Electric Ass'n. of Massachusetts* v. *S.E.C.*, 413 F.2d 1052, decision that the SEC must consider antitrust matters in a proceeding under Section 10 of the Public Utility Holding Company Act, 15 U.S.C. § 79j, to authorize acquisition of securities or utility assets, the Court pointed out that the standard for SEC approval under the latter section explicitly involves issues of interlocking relations and concentration of control (Pet.

App. 25a-26a). The Court distinguished the duty of the SEC from that of the FPC to consider allegations of anticompetitive conduct in approving securities issuances on the ground that, unlike the SEC, the FPC has regulatory jurisdiction over the operations of companies (Pet. App. 26a-28a).

SUMMARY OF ARGUMENT

Section 204 of the Federal Power Act prohibits the issuance of securities by a public utility without prior authorization of the Commission. The controversy here concerns the scope of the Commission's responsibilities under Section 204, specifically, whether the Commission is required to consider antitrust allegations before authorizing a securities issuance.

A.

In exercising its control over interconnections, security or asset acquisitions, mergers, rates, practices, and services of public utilities, the Commission has full authority to consider antitrust allegations and to prevent or remedy antitrust violations related to such matters. The Commission may also investigate on its own motion or another's petition the possibly unlawful conduct of public utilities. In view of these protections, the Commission should not be required to consider antitrust allegations in authorizing securities issuances. A proposed sale of securities gives rise to no anticompetitive effects which would not come within the above areas of the Commission's authority. Parties should not be able to delay public

utilities' financing, which is vital to the public's interest in adequate energy, simply by alleging that some allegedly improper conduct will be financed or refinanced by the proceeds of the proposed sale. The decision of the Court below permits this broad claim with respect to any securities issuance and turns Section 204 into a forum for general antitrust litigation. Public utilities are already subject to multiplicitous antitrust litigation, and the decision of the court below adds another arena, to the probable detriment of consumers relying on public utilities to satisfy their increasing energy demands.

The Clayton Act does not suggest a connection between antitrust and securities issuances, as it does for acquisitions, prices, practices, etc., activities the Commission is fully able to directly review for anticompetitive effects. The antitrust laws are intended to foster competition, yet public utilities whose financing is delayed by the decision of the Court below will be unable to compete against companies regulated by States or the SEC for financing in the money market, and that will actually reduce competition in the public utilities sector. The jurisdiction of the Federal Power Commission under Section 204 is limited to approving the issuance of any security by a public utility not subject to the jurisdiction of the SEC (Section 318 of the Federal Power Act, 16 U.S.C. § 825q) and not regulated by the laws of the state under which the company is organized and operating (Section 204(f), 16 U.S.C. § 825c(f)).

The decision of the Court below was based on this Court's ruling in *Denver & Rio Grande, supra,* that

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the ICC must consider antitrust claims in approving the securities issuances of common carriers, though this Court stated that the most significant question in that case was whether the carrier's stock should be acquired by another carrier. Applying this case to the Commission was erroneous because of differences between the agencies' statutory authority to consider the anticompetitive effects in all stock acquisition cases, and between the two agencies' earlier interpretations of the scope of their authority over stock issuances. In view of the Commission's full authority under other provisions, this Court's requirements of the ICC should not be read into Section 204 of the Federal Power Act.

B.

In exercising its authority over securities issuances, the Commission has consistently construed the scope of its responsibilities under Section 204 to be limited to the protection of the consumer and investor by prevention of any impairment of a company's financial integrity and ability to perform its public utility responsibilities. The legislative history shows clearly that these were the only purposes of Section 204. Accordingly, the Commission in this case properly found that allegations that Gulf States had engaged in anticompetitive activities were irrelevant to the proposed sale of bonds to refund short-term indebtedness.

The Court below erroneously failed to give weight to the Commission's interpretation and to the evidence of Congress' intent and held that the Commission is required to consider antitrust allegations in

proceedings under Section 204. This requirement that such proceedings be opened up to the complexities of antitrust litigation, besides being legally unfounded, can defeat the purposes of Section 204. The money market and ever-increasing demand for electric energy necessitate expedition in Section 204 proceedings if public utilities are to maintain financial soundness and meet their responsibilities to the public.

The decision of the Court below was also wrong in light of its concurrent decision, and correct decision we submit, that the SEC need not consider antitrust allegations in approving securities issuances of holding companies. The SEC's authority over such securities stems from Title I of the Public Utility Act of 1935 (Public Utility Act); the Commission's similar authority under Section 204 was enacted as part of Title II of that act. Congress' primary concern in enacting the Public Utility Act was to remedy the financial abuses of holding companies, which were easily hidden within their complex corporate structures. As a result, Congressional requirements for the Commission's scrutiny of security issuances of some, but not all, public utilities were not nearly as extensive of those for the SEC. Contravening this clear legislative purpose, the effect of the decision below is to encourage public utilities to adopt a holding company structure or to bring themselves within a State Commission's jurisdiction, in order to facilitate their quest for adequate financing to meet their responsibilities as public utilities. In either case, the FPC would lose jurisdiction under Section 204.

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ARGUMENT

THE FEDERAL POWER COMMISSION SHOULD NOT BE REQUIRED TO DELAY PUBLIC UTILITIES' FINANCING IN ORDER TO CONSIDER ANTITRUST ALLEGATIONS WHICH IT CAN FULLY CONSIDER AND REMEDY IN OTHER PROCEEDINGS UNDER THE FEDERAL POWER ACT.

A. The Commission Should Be Permitted To Consider Antitrust Allegations Under The Federal Power Act In Proceedings Where Such Allegations Are Directly Related And Where The Commission Can Order An Appropriate Remedy.

In 1935, with the financial community and the consumer still reeling from the loss of public confidence which resulted from the stock market crash of 1929 and following an extensive federal investigation of public utilities,[4] Congress enacted the Public Utility Act. Title I of that act placed the financial practices of public utility holding companies[5] under strict regulation of the SEC, and Title II authorized the Commision to regulate both the financial practices and operations of some, but not all, public utilities, as defined in Section 201 of the Federal Power Act, 16 USC § 824, as the Court below recognized (Pet. App. 17a-19a). The issue before this Court requires a determination of wheth-

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[4] See Federal Trade Commission, *In Response to Sen. Res. No. 83, Monthly Reports on the Electric Power and Utilities Inquiry*, S. Doc. No. 92, Pts. 1-84II, 70th Cong., 1st Sess. (1928-36).

[5] For the definition of "holding company," see 15 U.S.C. § 79b(a)(7).

er the Commission is required to consider antitrust allegations when authorizing securities issuances, the one aspect of its control over financial practices which does not give rise to antitrust issues and which requires expedition, when it has full authority to consider and to remedy antitrust violations by public utilities by means of its various controls over operations. The proliferation of forums in which antitrust allegations can presently be raised against regulated industries [6] makes this determination particularly important.

It is well established that an administrative agency may consider antitrust policies in carrying out its regulatory functions in the public interest. *FMC* v. *Aktiebolaget Svenska Amerika Linien*, 390 U.S. 238, 244. Under the doctrine of primary jurisdiction, cases involving regulated industries and antitrust issues are usually referred by this Court and others to such agencies for the initial decision. *Pan American World Airways* v. *United States*, 371 U.S. 296, *U. S. Navigation Co.* v. *Cunard S.S. Co.*, 284

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[6] As a result of the decision below, at least two, and possibly three, federal agencies will be considering the cities' allegations of anti-competitive practices. In addition to the Federal Power Commission's proceeding, the Department of Justice has issued Civil Investigative Demands to determine whether there is any basis for filing an antitrust complaint in a district court. See 15 U.S.C. 1312. Moreover, the Atomic Energy Commission may be called upon to consider anti-competitive practices in connection with nuclear plant licensing cases. *Louisiana Power & Light Co.*, Docket Nos. 50-382A and 50-383A. See 42 U.S.C. 2135. At the present time, no means of consolidating discovery and the taking of evidence among the several agencies has been devised.

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U.S. 474, *Carter* v. *American Tel. & Tel. Co.*, 365 F.2d 486, certiorari denied, 385 U.S. 1008. Yet it is not clear when an agency is *required* to consider antitrust issues in securities issuances, as is apparent from the self-contradictory decision of the Court below, which found the Commission required and the SEC not required to consider antitrust claims in authorizing securities issuances. Compare *Denver & Rio Grande, supra* (consideration of antitrust claims required for ICC approval of securities issuance); *Cities of Statesville* v. *A.E.C.*, 441 F.2d 962 (CA DC) (consideration of antitrust claims not required for AEC provisional licensing); *Northern Natural Gas Co.* v. *Federal Power Commission*, 399 F.2d 953 (CADC); *City of Pittsburgh* v. *Federal Power Commission*, 237 F.2d 741 (CADC) (consideration of antitrust claims required for the Commission's pipeline certification). In view of the broad antitrust protections of other provisions under the Federal Power Act and the contrasting narrow responsibilities of the Commission under Section 204, see pp. 20-25, *infra*, we submit that the Commission should not be required to consider antitrust allegations under Section 204. The decision of the Court below simply adds unnecessarily to the numerous forums in which antitrust allegations must be considered and increases the possibility that public utilities will be unable to raise capital and expand their facilities to meet the public's increasing energy needs.

Allegations of anticompetitive conduct would be properly raised and fully considered by the Commis-

sion in proceedings to order an interconnection under Section 202, 16 U.S.C. § 824a, to approve acquisitions or any merger under Section 203, 16 U.S.C. § 824b, to review rates under Sections 205 and 206, 16 U.S.C. §§ 824d and 824e, to review charges of unduly discriminatory rates or practices under Section 205, 16 U.S.C. § 824d, or to review charges of inadequate service under Section 207, 16 U.S.C. § 824f. Under each of these sections the Commission has jurisdiction to compel certain action by a public utility. If anticompetitive conduct or effects were established in such proceedings and were not outweighed by other factors which determine the public interest, the Commission could order a remedy *directly related* to the facts proven, *e.g.*, order an interconnection, deny authorization of acquisitions, order a change in rates, etc. The instant case demonstrates this point very clearly. Under Section 202, Cities could have requested the Commission to order a compulsory interconnection between the Cities and Companies, a direct and adequate solution to Cities' need for transmission services. It should also be noted that while any proven past antitrust violations would be considered by the Commission in determining whether an interconnection order would be in the public interest, Cities could seek this remedy on other grounds as well.

In addition to these specific regulatory controls over operations, the Commission has broad authority to institute a proceeding to investigate practices or conduct of public utilities subject to its jurisdiction which might be unlawful, upon any person's complaint under

Section 306 or upon its own initiative under Section 307, 16 U.S.C. §§ 825e and 825f. Accordingly, the Commission is presently investigating allegations of anticompetitive conduct by Gulf States in a proceeding instituted under Sections 202, 306 and 307, 16 U.S.C. §§ 824a, 825e, and 825f. *The Cities of Lafayette and Plaquemine, Louisiana* v. *Gulf States Utilities Company, Louisiana Power & Light Company, Central Louisiana Electric Company*, FPC Docket No. E-7676. Upon a finding of antitrust violations in any such proceedings, the Commission can exercise its authority over operations, discussed *supra* at pp. 13-14, and/or parties can seek other remedies in the courts.

Antitrust allegations can be relevant in proceedings to order interconnections, to approve acquisitions, mergers, rates or practices of public utilities, or to investigate complaints about public utilities, because monopolistic or discriminatory practices can be directly prevented or remedied in all these matters. In contrast, a company's mere proposal to raise funds for a lawful object does not give rise to antitrust issues. Any party can raise a claim that the proceeds would be used to "finance or refinance" any conduct, anticompetitive or not, as Cities alleged in this case (J.A. 56). In order to prevent the potential misuse of such a broad claim and a delay in necessary financing, the Commission should be permitted to consider allegations of actual anticompetitive conduct in the pertinent regulatory contexts named above and apply such remedies as it is authorized to order. To the extent that the Commission is authorized to con-

sider and remedy antitrust matters, it "should be free to fashion its own rules of procedure and to pursue methods of inquiry capable of permitting it to discharge its multitudinous duties." *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 143. This established principle of broad procedural authority has been upheld in a variety of applications, *FCC* v. *Schreiber*, 381 U.S. 279, 290, and based on it, this Court affirmed in *Pottsville* the FCC's choice of proceeding to consider several applications for a license, and in *Schreiber* the FCC's prescription of procedure for investigations. Similarly, the Commission should be permitted to utilize the proceedings it determines to be best suited for considering and remedying antitrust claims, for "administrative agencies and administrators will be familiar with the industries which they regulate and will be in a better position than federal courts or Congress itself to design procedural rules adopted to the peculiarities of the industry and the tasks of the agency involved." 381 U.S. at 290. The Commission is most aware of public utilities' problems in meeting the energy demands in this country and is fully cognizant of its authority under other sections of the Federal Power Act, as is demonstrated by FPC Docket No. E-7676, *supra*. Since private and public interests can best be protected in other ways, the Commission should not be required to consider antitrust issues under Section 204.

It should be noted that the Clayton Act, the most explicit expression of Congress' antitrust concerns, forbids acquisitions, mergers, and discriminatory prices or practices for anticompetitive purposes, but

does not even allude to the issuance of securities for such purposes. See Sections 2, 3, 7, and 8, 15 U.S.C. §§ 13, 14, 18 and 19. Congress apparently recognized that a company should be able to raise capital as it sees fit and should be subject only to direct review of actual anticompetitive practices. The wisdom of this approach is even more compelling in the case of public utilities, which might be prevented from financing the facilities needed to meet the energy requirements of consumers if the approval of securities issuances is delayed while broad antitrust claims are entertained.

The Court below based its contrary decision entirely on the inapposite opinion of this Court in the *Denver & Rio Grande* case, *supra*, which construed the ICC's duty to consider antitrust matters under Section 20a of the Interstate Commerce Act, 49 U.S.C. § 20a. The order under review was the ICC's authorization for Railway Express Agency, Inc. (REA), to issue to Greyhound common stock equalling a 20 percent interest in REA. Whereas the similarity between the language of Section 20a of the latter act and Section 204 of the Federal Power Act is apparent, this Court's basis for its decision in that case reveals its inapplicability to the Commission's duties under Section 204 of the Federal Power Act. First, this Court was primarily concerned with the anticompetitive potential of the *acquisition of stock of one transport company by another*, stating that "the most significant question which the ICC must face is whether it is in the public interest that REA continue to be owned by other transport companies, and specifically by Greyhound." 387 U.S. at 507. If such a

question arose when a public utility issued stock, the Commission would consider it under Section 203 of the Federal Power Act, 16 U.S.C. § 824b, which requires Commission approval of one utility's acquiring any security of another. In such a proceeding the Commission does consider potential anticompetitive effects. *Commonwealth Edison Co. and Central Illinois Electric and Gas Co.*, 36 FPC 927, affirmed *sub nom. Utility Users League* v. *Federal Power Commission*, 394 F.2d 16 (CA 7), certiorari denied, 393 U.S. 953. In contrast to the Federal Power Act, this Court recognized in *Denver & Rio Grande* that the ICC has comparable authority over securities acquisitions under Section 5(2)(a)(i) of the Interstate Commerce Act, 49 U.S.C. § 5(2)(a)(i), only when a carrier *acquires control* of another carrier through stock ownership. Whereas the ICC would thus have to consider anticompetitive effects of stock acquisitions under its Section 20a authority over stock issuances where the threshold requirement of control was not met, as in *Denver & Rio Grande*, the Federal Power Commission would evaluate such issues fully under its Section 203 authority over stock acquisitions. This obviates the need for a comparable requirement in Section 204 proceedings.

A second important and equally inapplicable basis for this Court's decision in *Denver & Rio Grande* was the ICC's history of weighing anticompetitive consequences in other proceedings under Section 20a of the Interstate Commerce Act, 387 U.S. at 494-6. Just as this Court gave great weight to the ICC decisions

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demonstrating its own past interpretation of that statute, it should give effect to the Commission's consistent interpretation of the limited scope of its authority under Section 204. See pp. 20-22, *infra*.

This Court has recognized that the Commission has not been granted the power to adjudicate antitrust issues as such, outside the regulatory powers it possesses. *California* v. *Federal Power Commission*, 369 U.S. 482, 486. The decision of the Court below that the Commission must consider attenuated antitrust allegations under Section 204 will actually defeat that principle, since any anticompetitive activity could allegedly be financed by the proceeds of any securities issuance. The decision can also defeat the antitrust laws' purpose of fostering competition, since companies whose securities issuances can be authorized only after lengthy Section 204 proceedings will be unable to compete with utilities which are subject only to regulation by the States or the SEC.

These anomalous results of the decision of the Court below can only serve to defeat the public's interest in the continued viability of public utilities which are responsible to supply the country's energy demands and of a regulatory scheme designed to protect both consumer and investor. This Court's decision ignores the complete and adequate antitrust safeguards of the Federal Power Act as a whole, despite the familiar rule of law that a statute should be construed as a whole. *United States* v. *American Trucking Ass'ns*, 310 U.S. 534, 544. It simply adds unnecessarily and to the detriment of consumers one more instance in which antitrust allegations must

be entertained and provides one more example of the recognized difficulty in the accommodation of antitrust policy to regulatory policy. See 3 Davis, Administrative Law § 19.05, at 25; *United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651, 663-4 (separate opinion); *Carter* v. *American Tel. & Tel. Co., supra* at 493. It is clearly not in the public interest that consumers dependant upon public utilities should be subject to multifarious litigation of antitrust issues and uncertainty in matters of capital financing.

B. Section 204 Of The Federal Power Act Contains No Requirement That The Commission Consider Antitrust Allegations When Authorizing The Issuance Of Securities.

Section 204(a), 15 U.S.C. § 824c(a), prohibits the issuance of securities by a public utility without prior authorization of the Commission and requires the Commission to authorize a securities issuance if it finds:

> * * * that such issue or assumption (a) is for some lawful object, within the corporate purposes of the applicant and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the applicant of service as a public utility and which will not impair its ability to perform that service, and (b) is reasonably necessary or appropriate for such purposes. * * *

The scope of the Commission's responsibility under Section 204 has not been interpreted by any court before the instant case, but the Commission has con-

strued it to be limited, saying in *Pacific Power & Light Company, supra* at 626:

> The plain purpose of Section 204 is to prevent the issuance of securities which might impair the company's financial integrity or its ability to perform its public utility responsibilities.

In keeping with that interpretation, the Commission declined to consider in that case the details of the planned expenditures of the proceeds of the proposed sale of securities. The Commission further elucidated the factors it could consider in a Section 204 proceeding (*id.* at 628):

> In testing a security issue by the statutory standard, the Commission must satisfy itself, of course, that the object is lawful and within the corporate purposes. Beyond that, we must inquire whether the contemplated investment would impair the company's ability to perform its normal functions as a public utility. The Commission might look to whether the investment is so improvident, frivolous, or speculative, that it threatens to squander the corporate substance without reasonable hope of return.

Significantly, the Commission has consistently followed this interpretation as to the limited scope of Section 204. See *e.g. Idaho Power Company*, 28 FPC 967, *Black Hills Power & Light Company*, 28 FPC 1121, *Black Hills Power & Light Company*, 31 FPC 1605.

This Court has recognized the importance of such interpretation by an administrative agency, stating that "(w)hen faced with a problem of statutory con-

struction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration." *Udall* v. *Tallman*, 380 U.S. 1, 16. In an earlier case precisely on point with the case at bar, this Court stated that an agency's interpretation in any case is entitled to great weight and construed the Motor Carrier Act of 1935 as giving the ICC only limited authority to regulate the qualifications and hours of employees, in keeping with the ICC's interpretation. *United States* v. *American Trucking Ass'ns, supra* at 549.

The legislative history of Section 204 fully supports the Commission's interpretation. Throughout the Congressional reports and testimony, the only concern expressed was protection of the public interest by the prohibition of security issues which are financially unsound. The Senate Committee Report explained the relationship of the public interest to financial practices under Section 204 as follows:

> Control over capitalization of operating utilities is plainly an essential means of safeguarding the public against unsound financial practices which make impossible the proper and most economic performance of public-utility functions.[7]

In a similar vein, and without specifically mentioning the term "public interest," the House Committee Report explained the limits of the Commission's authority over security issuances:

> Approval must be given if the issue is for a lawful purpose, consistent with the proper per-

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[7] S. Rep. No. 621, 74th Cong., 1st Sess. 50 (1935).

> formance by the applicant of service as a public utility.[8]

In explaining Title II of the Public Utility Act on the floor of the House, a member of the House Committee similarly emphasized its effect on public utilities' financial practices, stating:

> These provisions, if rightly and sanely administered, will give greater credence to what public utilities do; it will make their reports and their accounts reliable; it will add to the value of their stocks and their securities; such stocks and securities will be founded more certainly and more securely on real values and freer from the suspicion of manipulation, deception, and watered values.[9]

These provisions were aimed at ending the many abuses of utility companies in connection with security issuances, which were revealed after the extensive investigation of the Federal Trade Commission (FTC) leading to passage of the Holding Company Act.[10] The FTC report did not refer to antitrust problems in security issuances.

Given the public's obvious interest in sound financial practices of public utilities, Congress' use of the phrase "compatible with the public interest" in Section 204 as a standard for testing the financial

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[8] H. Rep. No. 1318, 74th Cong., 1st Sess. 28 (1935).

[9] 79 Cong. Rec. 10379 (1935) (remarks of Congressman Lea of California).

[10] See Federal Trade Commission, *Summary Report on Economic, Financial, and Corporate Phases of Holding and Operating Companies of Electric and Gas Utilities*, S. Doc. No. 92, Pt. 72-A, 70th Cong., 1st Sess. 350-63 (1935).

soundness of securities issuances should not be lifted out of and expanded beyond that context. As this Court stated in the *American Trucking* case, *supra*, "a few words of general connotation appearing in the text of statutes should not be given a wide meaning, contrary to a settled policy, 'excepting as a different purpose is plainly shown.'" 310 U.S. at 544. No broad legislative intent was indicated in 1935. In light of the limited concern of Congress over utilities' security issuances, the Court below should have adhered to its own recent decision in *Cities of Statesville* v. *A.E.C.*, *supra*, wherein it affirmed an order of the AEC granting a provisional license for an applicant's nuclear reactors under Section 104(b), without considering anticompetitive claims. The Court held that the AEC is not required to consider antitrust implications in applying a "public interest" standard in such proceedings, although it must in others, saying (441 F.2d at 972):

> [I]n reading the legislative history of this Act, one can find many examples of the drafters' intent to narrowly limit antitrust considerations to specific portions of the statute while expanding health and national security considerations of the Act as a whole.

The legislative history of the Federal Power Act cited above shows clearly that Congress narrowly developed the "public interest" standard with respect to securities issuances, intending only to include considerations of a company's financial integrity and ability to meet its public utility responsibilities.

Congress' intent to safeguard the public's interest in sound financial practices of public utilities and in their resulting capability to perform their public utility functions would actually be defeated by a requirement that the Commission consider antitrust allegations before authorizing security issuances. As the Commission stated in *Pacific Power & Light Company*, *supra* at 629:

> It should also be observed that procedures for considering security issues must be expeditious if, in view of changing market conditions, utilities are to be able to raise money needed to carry out their responsibilities.

These considerations have continuing validity, in view of the necessity that public utilities be able to compete in the money market in order to meet the ever-increasing demands for electric energy.[11] Even the Court below recognized that security issues to provide funds for a utility's construction must be decided in a time frame much more limited than that often contemplated for antitrust litigation. (Pet. App. 22a-23a).

Despite the Commission's interpretation and specific evidence of Congressional intent, the Court below found controlling this Court's decision in the *Denver & Rio Grande* case, *supra*. As we have explained, see pp. 17-19, *supra*, the reasoning and

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[11] See *e.g.* Oster, "Economic Dimensions of the Seventies: Their Implications for the Utilities," in *Utility Regulation During Inflation* 115-133 (Seminar on the Economics of Regulated Industries During Inflation, 2d, Occidental College, 1970).

result of that case are inapplicable to the Commission's actions under the Federal Power Act.

The decision of the Court below that the SEC generally is not required to consider antitrust allegations in approving a security issuance of a public utility holding company or its subsidiary, while such consideration is required of the Commission, works the anomalous result that the securities of public utilities are subject to closer scrutiny than those of public utility holding companies. This contravenes the known fact that in enacting the Public Utility Act, Congress' primary concern was with holding companies. Most of the legislative history refers to Title I of the Public Utility Act, and the many "evils" of holding companies' financial practices were expressly enumerated in the original bill. See 79 Cong. Rec. 10363 (1935) (remarks of Congressman Wolverton of New Jersey). Comparison of Sections 6 and 7 of Title I, 15 U.S.C. § 79f and 79g, with Section 204 of Title II, 16 U.S.C. § 824c, shows clearly Congress' intent that the securities of a holding company should receive more exacting scrutiny, though limited under both titles to the financial soundness and valid corporate purpose of the proposed issuance. We agree with the Court below that the anticompetitive effects of the acquisition of stock by a holding company are adequately reviewable under Sections 9 and 10 of Title I, 15 U.S.C. §§ 79i and 79j, and assert that a similar distinction between stock acquisitions and issuances is present in Sections 203 and 204 of Title II, 16 U.S.C. §§ 824b and

824c. Any other construction would provide incentive for a company competing in the money market to enter a holding company arrangement, a corporate form clearly not favored by the 1935 Congress which considered banning holding companies altogether. See 79 Cong. Rec. 10362-5 (1935) (remarks of Congressman Wolverton).

CONCLUSION

The judgment of the Court of Appeals remanding the order of the Commission subjects public utilities to an undue burden of multiplicitous antitrust litigation, impedes unnecessarily their ability to meet the energy demands of the public, ignores the limited scope of Section 204 and the adequacy of antitrust protections under other provisions of the Federal Power Act, and adds to the growing conflict in decisions concerning the coordination of antitrust and regulatory policies. For these reasons that judgment should be reversed.

Respectfully submitted.

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I authorize the filing of the above brief.

ERWIN N. GRISWOLD,
Solicitor General.

AUGUST 1972.

APPENDIX

The Federal Power Act provides in pertinent part:

Section 207, 16 U.S.C. § 824f

§ 824f. Ordering furnishing of adequate service

Whenever the Commission, upon complaint of a State commission, after notice to each State commission and public utility affected and after opportunity for hearing, shall find that any interstate service of any public utility is inadequate or insufficient, the Commission shall determine the proper, adequate, or sufficient service to be furnished, and shall fix the same by its order, rule, or regulation: *Provided*, That the Commission shall have no authority to compel the enlargement of generating facilities for such purposes, nor to compel the public utility to sell or exchange energy when to do so would impair its ability to render adequate service to its customers. June 10, 1920, c. 285, § 207, as added Aug. 26, 1935, c. 687, Title II, § 213, 49 Stat. 853.

The Interstate Commerce Act provides in pertinent part:

Sections 5(2)(a)(i) and 20a, 49 U.S.C. §§ 5(2)(a)(i) and 20a

§ 5, par. (2). Unifications, mergers, and acquisitions of control.

(a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b) of this paragraph—

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part

thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise;

* * * *

§ 20a. Securities of carriers; issuance, etc.

Carrier defined

(1) As used in this section, the term "carrier" means a common carrier by railroad (except a street, suburban, or interurban electric railway which is not operated as a part of a general steam railroad system of transportation) which is subject to this chapter, or any corporation organized for the purpose of engaging in transportation by railroad subject to this chapter, or a sleeping-car company which is subject to this chapter.

Issuance of securities; assumption of obligations; authorization

(2) It shall be unlawful for any carrier to issue any share of capital stock or any bond or other evidence of interest in or indebtedness of the carrier (hereinafter in this section collec-

tively termed "securities") or to assume any obligation or liability as lessor, lessee, guarantor, indorser, surety, or otherwise, in respect of the securities of any other person, natural or artificial, even though permitted by the authority creating the carrier corporation, unless and until, and then only to the extent that, upon application by the carrier, and after investigation by the commission of the purposes and uses of the proposed issue and the proceeds thereof, or of the proposed assumption of obligation or liability in respect of the securities of any other person, natural or artificial, the commission by order authorizes such issue or assumption. The commission shall make such order only if it finds that such issue or assumption: (a) is for some lawful object within its corporate purposes, and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the carrier of service to the public as a common carrier, and which will not impair its ability to perform that service, and (b) is reasonably necessary and appropriate for such purpose.

Scope of commission's authority

(3) The commission shall have power by its order to grant or deny the application as made, or to grant it in part and deny it in part, or to grant it with such modifications and upon such terms and conditions as the commission may deem necessary or appropriate in the premises, and may from time to time, for good cause shown, make such supplemental orders in the premises as it may deem necessary or appro-

priate, and may by any such supplemental order modify the provisions of any previous order as to the particular purposes, uses, and extent to which, or the conditions under which, any securities so theretofore authorized or the proceeds thereof may be applied, subject always to the requirements of paragraph (2) of this section.

Form and contents of application; oath and signature

(4) Every application for authority shall be made in such form and contain such matters as the commission may prescribe. Every such application, as also every certificate of notification hereinafter provided for, shall be made under oath, signed and filed on behalf of the carrier by its president, a vice president, auditor, comptroller, or other executive officer having knowledge of the matters therein set forth and duly designated for that purpose by the carrier.

Disposition of securities described in application, etc.

(5) Whenever any securities set forth and described in any application for authority or certificate of notification as pledged or held unencumbered in the treasury of the carrier shall, subsequent to the filing of such application or certificate, be sold, pledged, repledged, or otherwise disposed of by the carrier, such carrier shall, within ten days after such sale, pledge, repledge, or other disposition, file with the commission a certificate of notification to that effect, setting forth therein all such facts as may be required by the commission.

Notice of application to governors of States; intervention; hearings

(6) Upon receipt of any such application for authority the commission shall cause notice thereof to be given to and a copy filed with the governor of each State in which the applicant carrier operates. The railroad commissions, public service, or utilities commissions, or other appropriate State authorities of the State shall have the right to make before the commission such representations as they may deem just and proper for preserving and conserving the rights and interests of their people and the States, respectively, involved in such proceedings. The commission may hold hearings, if it sees fit, to enable it to determine its decision upon the application for authority.

Jurisdiction of commission as exclusive and plenary

(7) The jurisdiction conferred upon the commission by this section shall be exclusive and plenary, and a carrier may issue securities and assume obligations or liabilities in accordance with the provisions of this section without securing approval other than as specified herein.

Guaranty of securities

(8) Nothing herein shall be construed to imply any guaranty or obligation as to such securities on the part of the United States.

Issue of short-term notes; certificate of notification; proviso

(9) The foregoing provisions of this section shall not apply to notes to be issued by the car-

rier maturing not more than two years after the date thereof and aggregating (together with all other then outstanding notes of a maturity of two years or less) not more than 5 per centum of the par value of the securities of the carrier then outstanding. In the case of securities having no par value, the par value for the purposes of this paragraph shall be the fair market value as of the date of issue. Within ten days after the making of such notes the carrier issuing the same shall file with the commission a certificate of notification, in such form as may from time to time be determined and prescribed by the commission, setting forth as nearly as may be the same matters as those required in respect of applications for authority to issue other securities: *Provided*, That in any subsequent funding of such notes the provisions of this section respecting other securities shall apply.

Reports by carriers as to securities or proceeds

(10) The commission shall require periodical or special reports from each carrier issuing any securities, including such notes, which shall show, in such detail as the commission may require, the disposition made of such securities and the application of the proceeds thereof.

Securities issued contrary to law void; effect; penalty

(11) Any security issued or any obligation or liability assumed by a carrier, for which under the provisions of this section the authorization of the commission is required, shall be void, if issued or assumed without such authorization therefor having first been obtained, or if issued

or assumed contrary to any term or condition of such order of authorization as modified by any order supplemental thereto entered prior to such issuance or assumption; but no security issued or obligation or liability assumed in accordance with all the terms and conditions of such an order of authorization therefor as modified by any order supplemental thereto entered prior to such issuance or assumption, shall be rendered void because of failure to comply with any provision of this section relating to procedure and other matters preceding the entry of such order of authorization. If any security so made void or any security in respect to which the assumption of obligation or liability is so made void, is acquired by any person for value and in good faith and without notice that the issue or assumption is void, such person may in a suit or action in any court of competent jurisdiction hold jointly and severally liable for the full amount of the damage sustained by him in respect thereof, the carrier which issued the security so made void, or assumed the obligation or liability so made void, and its directors, officers, attorneys, and other agents, who participated in any way in the authorizing, issuing, hypothecating, or selling of the security so made void or in the authorizing of the assumption of the obligation or liability so made void. In case any security so made void was directly acquired from the carrier issuing it the holder may at his option rescind the transaction and upon the surrender of the security recover the consideration given therefor. Any director, officer, attorney, or agent of the carrier who knowingly assents to or concurs in any issue

of securities or assumptions of obligation or liability forbidden by this section, or any sale or other disposition of securities contrary to the provisions of the commission's order or orders in the premises, or any application not authorized by the commission of the funds derived by the carrier through such sale or other disposition of such securities, shall be guilty of a misdemeanor and upon conviction shall be punished by a fine of not less than $1,000 nor more than $10,000, or by imprisonment for not less than one year nor more than three years, or by both such fine and imprisonment, in the discretion of the court.

Restrictions on actions of officers and directors; penalty

(12) It shall be unlawful for any person to hold the position of officer or director of more than one carrier, unless such holding shall have been authorized by order of the commission, upon due showing, in form and manner prescribed by the commission, that neither public nor private interests will be adversely affected thereby. It shall be unlawful for any officer or director of any carrier to receive for his own benefit, directly or indirectly, any money or thing of value in respect of the negotiation, hypothecation, or sale of any securities issued or to be issued by such carrier, or to share in any of the proceeds thereof, or to participate in the making or paying of any dividends of an operating carrier from any funds properly included in capital account. Any violation of these provisions shall be a misdemeanor, and on conviction in any United States

court having jurisdiction shall be punished by a fine of not less than $1,000 nor more than $10,000, or by imprisonment for not less than one year nor more than three years, or by both such fine and imprisonment, in the discretion of the court. Feb. 4, 1887, c. 104, Pt. I, § 20a, as added Feb. 28, 1920, c. 91, § 439, 41 Stat. 494; Aug. 9, 1935, c. 498, § 1, 49 Stat. 543; Aug. 2, 1949, c. 379, § 10, 63 Stat. 487.

The Public Utility Holding Company Act of 1935 provides in pertinent part:

Sections 6, 7, 9, and 10, 15 U.S.C. §§ 79f, 79g, 79i, and 79j

§ 79f. Unlawful transactions by registered companies—Issuing, selling, or altering rights of stockholders to declaration

(a) Except in accordance with a declaration effective under section 79g of this title and with the order under such section permitting such declaration to become effective, it shall be unlawful for any registered holding company or subsidiary company thereof, by use of the mails or any means or instrumentality of interstate commerce, or otherwise, directly or indirectly (1) to issue or sell any security of such company; or (2) to exercise any privilege or right to alter the priorities, preferences, voting power, or other rights of the holders of an outstanding security of such company.

Exemptions from operation of subsection (a)

(b) The provisions of subsection (a) of this section shall not apply to the issue, renewal, or

guaranty by a registered holding company or subsidiary company thereof of a note or draft (including the pledge of any security as collateral therefor) if such note or draft (1) is not part of a public offering, (2) matures or is renewed for not more than nine months, exclusive of days of grace, after the date of such issue, renewal, or guaranty thereof, and (3) aggregates (together with all other then outstanding notes and drafts of a maturity of nine months or less, exclusive of days of grace, as to which such company is primarily or secondarily liable) not more than 5 per centum of the principal amount and par value of the other securities of such company then outstanding, or such greater per centum thereof as the Commission upon application may by order authorize as necessary or appropriate in the public interest or for the protection of investors or consumers. In the case of securities having no principal amount or no par value, the value for the purposes of this subsection shall be the fair market value as of the date of issue. The Commission by rules and regulations or order, subject to such terms and conditions as it deems appropriate in the public interest or for the protection of investors or consumers, shall exempt from the provisions of subsection (a) of this section the issue or sale of any security by any subsidiary company of a registered holding company, if the issue and sale of such security are solely for the purpose of financing the business of such subsidiary company and have been expressly authorized by the State commission of the State in which such subsidiary company is organized and doing business, or if the issue and

sale of such security are solely for the purpose of financing the business of such subsidiary company when such subsidiary company is not a holding company, a public-utility company, an investment company, or a fiscal or financing agency of a holding company, a public utility company, or an investment company. The provisions of subsection (a) of this section shall not apply to the issue, by a registered holding company or subsidiary company thereof, of a security issued pursuant to the terms of any security outstanding on January 1, 1935, giving the holder of such outstanding security the right to convert such outstanding security into another security of the same issuer or of another person, or giving the right to subscribe to another security of the same issuer or another issuer. Within ten days after any issue, sale, renewal, or guaranty exempted from the application of subsection (a) of this section by or under authority of this subsection, such holding company or subsidiary company thereof shall file with the Commission a certificate of notification in such form and setting forth such of the information required in a declaration under section 79g of this title as the Commission may by rules and regulations or order prescribe as necessary or appropriate in the public interest or for the protection of investors or consumers.

Selling from house to house; causing officer or employer of subsidiary to sell

(c) It shall be unlawful, by use of the mails or any means or instrumentality of interstate commerce, or otherwise, for any registered hold-

ing company or any subsidiary company thereof, directly or indirectly,—

(1) to sell or offer for sale or to cause to be sold or offered for sale, from house to house, any security of such holding company; or

(2) to cause any officer or employee of any subsidiary company of such holding company to sell or cause to be sold any security of such holding company.

As used in this subsection the term "house" shall not include an office used for business purposes. Aug. 26, 1935, c. 687, Title I, § 6, 49 Stat. 814.

§ 79g. Declarations by registered companies in respect to security transactions—Contents

(a) A registered holding company or subsidiary company thereof may file a declaration with the Commission, regarding any of the acts enumerated in subsection (a) of section 79f of this title, in such form as the Commission may by rules and regulations prescribe as necessary or appropriate in the public interest or for the protection of investors or consumers. Such declaration shall include—

(1) such of the information and documents which are required to be filed in order to register a security under section 77g of this title, as the Commission may by rules and regulations or order prescribe as necessary or appropriate in the public interest or for the protection of investors or consumers; and

(2) such additional information, in such form and detail, and such documents regarding the declarant or any associate company thereof, the particular security and compliance with such State laws as may apply to the act in question as the Commission may by rules and regulations or order prescribe as necessary or appropriate in the public interest or for the protection of investors or consumers.

Effective date of declaration; order of Commission

(b) A declaration filed under this section shall become effective within such reasonable period of time after the filing thereof as the Commission shall fix by rules and regulations or order, unless the Commission prior to the expiration of such period shall have issued an order to the declarant to show cause why declaration should become effective. Within a reasonable time after an opportunity for hearing upon an order to show cause under this subsection, unless the declarant shall withdraw its declaration, the Commission shall enter an order either permitting such declaration to become effective as filed or amended, or refusing to permit such declaration to become effective. Amendments to a declaration may be made upon such terms and conditions as the Commission may prescribe.

Conditions precedent to permitting declaration to become effective

(c) The Commission shall not permit a declaration regarding the issue or sale of a security to become effective unless it finds that—

(1) such security is (A) a common stock having a par value and being without preference as to dividends or distribution over, and having at least equal voting rights with, any outstanding security of the declarant; (B) a bond (i) secured by a first lien on physical property of the declarant, or (ii) secured by an obligation of a subsidiary company of the declarant secured by a first lien on physical property of such subsidiary company, or (iii) secured by any other assets of the type and character which the Commission by rules and regulations or order may prescribe as appropriate in the public interest or for the protection of investors; (C) a guaranty of, or assumption of liability on, a security of another company; or (D) a receiver's or trustee's certificate duly authorized by the appropriate court or courts; or

(2) such security is to be issued or sold solely (A) for the purpose of refunding, extending, exchanging, or discharging an outstanding security of the declarant and/or a predecessor company thereof or for the purpose of effecting a merger, consolidation, or other reorganization; (B) for the purpose of financing the business of the declarant as a public-utility company; (C) for the purpose of financing the business of the declarant, when the declarant is neither a holding company nor a public-utility company; and/or (D) for necessary and urgent corporate purposes of the declarant where the requirements of the provisions of para-

graph (1) of this subsection would impose an unreasonable financial burden upon the declarant and are not necessary or appropriate in the public interest or for the protection of investors or consumers; or

(3) such security is one the issuance of which was authorized by the company prior to January 1, 1935, and which the Commission by rules and regulations or order authorizes as necessary or appropriate in the public interest or for the protection of investors or consumers.

Conditions having permission of effectiveness

(d) If the requirements of subsections (c) and (g) of this section are satisfied, the Commission shall permit a declaration regarding the issue or sale of a security to become effective unless the Commission finds that—

(1) the security is not reasonably adapted to the security structure of the declarant and other companies in the same holding-company system;

(2) the security is not reasonably adapted to the earning power of the declarant;

(3) financing by the issue and sale of the particular security is not necessary or appropriate to the economical and efficient operation of a business in which the applicant lawfully is engaged or has an interest;

(4) the fees, commissions, or other remuneration, to whomsoever paid, directly or indirectly, in connection with the issue, sale, or distribution of the security are not reasonable;

(5) in the case of a security that is a guaranty of, or assumption of liability on, a security of another company, the circumstances are such as to constitute the making of such guaranty or the assumption of such liability an improper risk for the declarant; or

(6) the terms and conditions of the issue or sale of the security are detrimental to the public interest or the interest of investors or consumers.

Declaration regarding alterations, priorities, voting power, and other rights of security holders

(e) If the requirements of subsection (g) of this section are satisfied, the Commission shall permit a declaration to become effective regarding the exercise of a privilege or right to alter the priorities, preferences, voting power, or other rights of the holders of an outstanding security unless the Commission finds that such exercise of such privilege or right will result in an unfair or inequitable distribution of voting power among holders of the securities of the declarant or is otherwise detrimental to the public interest or the interest of investors or consumers.

Order permitting declaration to become effective

(f) Any order permitting a declaration to become effective may contain such terms and conditions as the Commission finds necessary to assure compliance with the conditions specified in this section.

Compliance with State laws as condition to permission of effectiveness

(g) If a State commission or State securities commission, having jurisdiction over any of the acts enumerated in subsection (a) of section 79f of this title, shall inform the Commission, upon request by the Commission for an opinion or otherwise, that State laws applicable to the act in question have not been complied with, the Commission shall not permit a declaration regarding the act in question to become effective until and unless the Commission is satisfied that such compliance has been effected. Aug. 26, 1935, c. 687, Title I, § 7, 49 Stat. 815.

§ 79i. Acquisition of securities and utility assets and other interests

(a) Unless the acquisition has been approved by the Commission under section 79j of this title, it shall be unlawful—

(1) for any registered holding company or any subsidiary company thereof, by use of the mails or any means or instrumentality of interstate commerce, or otherwise, to acquire, directly or indirectly, any securities or utility assets or any other interest in any business;

(2) for any person, by use of the mails or any means or instrumentality of interstate commerce, to acquire, directly or indirectly, any security of any public-utility company, if such person is an affiliate under clause (A) of paragraph (11) of subsection (a) of section 79b of this title, of such com-

pany and of any other public utility or holding company, or will by virtue of such acquisition become such an affiliate.

(b) Subsection (a) of this section shall not apply to—

(1) the acquisition by a public-utility company of utility assets the acquisition of which has been expressly authorized by a State commission; or

(2) the acquisition by a public-utility company of securities of a subsidiary public-utility company thereof, provided that both such public-utility companies and all other public-utility companies in the same holding-company system are organized in the same State, that the business of each such company in such system is substantially confined to such State, and that the acquisition of such securities has been expressly authorized by the State commission of such State.

(c) Subsection (a) of this section shall not apply to the acquisition by a registered holding company, or a subsidiary company thereof, of—

(1) securities of, or securities the principal or interest of which is guaranteed by, the United States, a State, or political subdivision of a State, or any agency, authority, or instrumentality of any one or more of the foregoing, or any corporation which is wholly owned, directly or indirectly, by any one or more of the foregoing;

(2) such other readily marketable securities within the limitation of such amounts,

as the Commission may by rules and regulations prescribe as appropriate for investment of current funds and as not detrimental to the public interest or the interest of investors or consumers; or

(3) such commercial paper and other securities, within such limitations, as the Commission may by rules and regulations or order prescribe as appropriate in the ordinary course of business of a registered holding company or subsidiary company thereof and as not detrimental to the public interest or the interest of investors or consumers.

Aug. 26, 1935, c. 687, Title I, § 9, 49 Stat. 817.

§ 79j. Approval of acquisition of securities and utility assets and other interests—Contents of application

(a) A person may apply for approval of the acquisition of securities or utility assets, or of any other interest in any business, by filing an application in such form as the Commission may by rules and regulations prescribe as necessary or appropriate in the public interest or for the protection of investors and consumers. Such application shall include—

(1) in the case of the acquisition of securities, such information and copies of such documents as the Commission may by rules and regulations or order prescribe as necessary or appropriate in the public interest or for the protection of investors or consumers in respect of—

(A) the security to be acquired, the consideration to be paid therefor, and compliance with such State laws as may apply in respect of the issue, sale, or acquisition thereof,

(B) the outstanding securities of the company whose security is to be acquired, the terms, position, rights, and privileges of each class and the options in respect of any such securities,

(C) the names of all security holders of record (or otherwise known to the applicant) owning, holding, or controlling 1 per centum or more of any class of security of such company, the officers and directors of such company, and their remuneration, security holdings in, material contracts with, and borrowings from such company and the officers or directorships held, and securities owned, held, or controlled, by them in other companies,

(D) the bonus, profit-sharing and voting trust agreements, underwriting arrangements, trust indentures, mortgages, and similar documents, by whatever name known, of or relating to such company,

(E) the material contracts, not made in the ordinary course of business, and the service, sales, and construction contracts of such company,

(F) the securities owned, held, or controlled, directly or indirectly, by such company,

(G) balance sheets and profit and loss statements of such company for not more than the five preceding fiscal years, certified, if required by the rules and regulations of the Commission by an independent public accountant,

(H) any further information regarding such company and any associate company or affiliate thereof or its relations with the applicant company, and

(I) if the applicant be not a registered holding company, any of the information and documents which may be required under section 79e of this title from a registered holding company;

(2) in the case of the acquisition of utility assets, such information concerning such assets, the value thereof and consideration to be paid therefor, the owner or owners thereof and their relation to, agreements with, and interest in the securities of, the applicant or any associate company thereof as the Commission may by rules and regulations or order prescribe as necessary or appropriate in the public interest or for the protection of investors or consumers; and

(3) in the case of the acquisition of any other interest in any business, such information concerning such business and the interest to be acquired, and the consideration to be paid, as the Commission may by rules and regulations or order prescribe as necessary or appropriate in the public interest or for the protection of investors or consumers.

Conditions affecting approval

(b) If the requirements of subsection (f) of this section are satisfied, the Commission shall approve the acquisition unless the Commission finds that—

(1) such acquisition will tend towards interlocking relations or the concentration of control of public-utility companies, of a kind or to an extent detrimental to the public interest or the interest of investors or consumers;

(2) in case of the acquisition of securities or utility assets, the consideration, including all fees, commissions, and other remuneration, to whomsoever paid, to be given, directly or indirectly, in connection with such acquisition is not reasonable nor does not bear a fear relation to the sums invested in or the earning capacity of the utility assets to be acquired or the utility assets underlying the securities to be acquired; or

(3) such acquisition will unduly complicate the capital structure of the holding-company system of the applicant or will be detrimental to the public interest or the interest of investors or consumers or the proper functioning of such holding-company system.

The Commission may condition its approval of the acquisition of securities of another company upon such a fair offer to purchase such of the other securities of the company whose security is to be acquired as the Commission may find necessary or appropriate in the public interest or for the protection of investors or consumers.

Conditions barring approval

(c) Notwithstanding the provisions of subsection (b) of this section, the Commission shall not approve—

(1) an acquisition of securities or utility assets, or of any other interest, which is unlawful under the provisions of section 79h of this title or is detrimental to the carrying out of the provisions of section 79k of this title; or

(2) the acquisition of securities or utility assets of a public-utility or holding company unless the Commission finds that such acquisition will serve the public interest by tending towards the economical and efficient development of an integrated public-utility system. This paragraph shall not apply to the acquisition of securities or utility assets of a public-utility company operating exclusively outside the United States.

Approval to be granted in reasonable time

(d) Within such reasonable time after the filing of an application under this section as the Commission shall fix by rules and regulations or order, the Commission shall enter an order either granting or, after notice and opportunity for hearing, denying approval of the acquisition unless the applicant shall withdraw its application. Amendments to an application may be made upon such terms and conditions as the Commission may prescribe.

Terms and conditions of order granting approval

(e) The Commission, in any order approving the acquisition of securities or utility assets, may prescribe such terms and conditions in respect of such acquisition, including the price to be paid for such securities or utility assets, as the Commission may find necessary or appropriate in the public interest or for the protection of investors or consumers.

Compliance with State laws as condition of approval

(f) The Commission shall not approve any acquisition as to which an application is made under this section unless it appears to the satisfaction of the Commission that such State laws as may apply in respect of such acquisition have been complied with, except where the Commission finds that compliance with such State laws would be detrimental to the carrying out of the provisions of section 79k of this title. Aug. 26, 1935, c. 687, Title I, § 10, 49 Stat. 818.

The Clayton Act provides in pertinent part:

Sections 2, 3, 7, and 8, 15 U.S.C. §§ 13, 14, 18 and 19

§ 13. Discrimination in price, services, or facilities—Price; selection of customers

(a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where

either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided*, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: *Provided, however*, That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established: *And provided further*, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in

restraint of trade: *And provided further*, That nothing herein contained shall prevent price changes from time to time wherein response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.

Burden of rebutting prima-facie case of discrimination

(b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however*, That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

Payment or acceptance of commission, brokerage or other compensation

(c) It shall be unlawful for any person engaged in commerce, in the course of such com-

merce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid.

Payment for services or facilities for processing or sale

(d) It shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

Furnishing services or facilities for processing, handling, etc.

(e) It shall be unlawful for any person to discriminate in favor of one purchaser against

another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms.

Knowingly inducing or receiving discriminatory price

(f) It shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section. Oct. 15, 1914, c. 323, § 2, 38 Stat. 730; June 19, 1936, c. 592, § 1, 49 Stat. 1526.

§ 14. Sale, etc., on agreement not to use goods of competitor

It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor

or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce. Oct. 15, 1914, c. 323, § 3, 38 Stat. 731.

§ 18. Acquisition by one corporation of stock of another

No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock of other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall, acquire the whole or any part of the assets of one or more corporations engaged in commerce, where in any line of commerce in any section of the country, the effect of such acquisition, of such stocks or assets, or of the use of such stock by the voting or granting of proxies or otherwise, may be substantially to lessen competition, or to tend to create a monopoly.

This section shall not apply to corporations purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about,

the substantial lessening of competition. Nor shall anything contained in this section prevent a corporation engaged in commerce from causing the formation of subsidiary corporations for the actual carrying on of their immediate lawful business, or the natural and legitimate branches or extensions thereof, or from owning and holding all or a part of the stock of such subsidiary corporations, when the effect of such formation is not to substantially lessen competition.

Nor shall anything herein contained be construed to prohibit any common carrier subject to the laws to regulate commerce from aiding in the construction of branches or short lines so located as to become feeders to the main line of the company so aiding in such construction or from acquiring or owning all or any part of the stock of such branch lines, nor to prevent any such common carrier from acquiring and owning all or any part of the stock of a branch or short line constructed by an independent company where there is no substantial competition between the company owning the branch line so constructed and the company owning the main line acquiring the property or an interest therein, nor to prevent such common carrier from extending any of its lines through the medium of the acquisition of stock or otherwise of any other common carrier where there is no substantial competition between the company extending its lines and the company whose stock, property, or an interest therein is so acquired.

Nothing contained in this section shall be held to affect or impair any right heretofore legally acquired: *Provided*, That nothing in this section

shall be held or construed to authorize or make lawful anything heretofore prohibited or made illegal by the antitrust laws, nor to exempt any person from the penal provisions thereof or the civil remedies therein provided.

Nothing contained in this section shall apply to transactions duly consummated pursuant to authority given by the Civil Aeronautics Board, Federal Communications Commission, Federal Power Commission, Interstate Commerce Commission, the Securities and Exchange Commission in the exercise of its jurisdiction under section 79j of this title, the United States Maritime Commission, or the Secretary of Agriculture under any statutory provision vesting such power in such Commission, Secretary, or Board. Oct. 15, 1914, c. 323, § 7, 38 Stat. 731; Dec. 29, 1950, c. 1184, 64 Stat. 1125.

§ 19. Interlocking directorates and officers

No private banker or director, officer, or employee of any member bank of the Federal Reserve System or any branch thereof shall be at the same time a director, officer, or employee of any other bank, banking association, savings bank, or trust company organized under the National Bank Act or organized under the laws of any State or of the District of Columbia, or any branch thereof, except that the Board of Governors of the Federal Reserve System may by regulation permit such service as a director, officer, or employee of not more than one other such institution or branch thereof; but the foregoing prohibition shall not apply in the case of any one or more of the following or any branch thereof:

(1) A bank, banking association, savings bank, or trust company, more than 90 per centum of the stock of which is owned directly or indirectly by the United States or by any corporation of which the United States directly or indirectly owns more than 90 per centum of the stock.

(2) A bank, banking association, savings bank, or trust company which has been placed formally in liquidation or which is in the hands of a receiver, conservator, or other official exercising similar functions.

(3) A corporation, principally engaged in international or foreign banking or banking in a dependency or insular possession of the United States which has entered into an agreement with the Board of Governors of the Federal Reserve System pursuant to sections 601-604 of Title 12.

(4) A bank, banking association, savings bank, or trust company, more than 50 per centum of the common stock of which is owned directly or indirectly by persons who own directly or indirectly more than 50 per centum of the common stock of such member bank.

(5) A bank, banking association, savings bank, or trust company not located and having no branch in the same city, town or village as that in which such member bank or any branch thereof is located, or in any city, town, or village contiguous or adjacent thereto.

(6) A bank, banking association, savings bank, or trust company not engaged in a

class or classes of business in which such member bank is engaged.

(7) A mutual savings bank having no capital stock.

Until February 1, 1939, nothing in this section shall prohibit any director, officer, or employee of any member bank of the Federal Reserve System, or any branch thereof, who is lawfully serving at the same time as a private banker or as a director, officer, or employee of any other bank, banking association, savings bank, or trust company, or any branch thereof, on August 23, 1935, from continuing such service.

The Board of Governors of the Federal Reserve System is authorized and directed to enforce compliance with this section, and to prescribe such rules and regulations as it deems necessary for that purpose.

No person at the same time shall be a director in any two or more corporations, any one of which has capital, surplus, and undivided profits aggregating more than $1,000,000, engaged in whole or in part in commerce, other than banks, banking associations, trust companies, and common carriers subject to the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, if such corporations are or shall have been theretofore, by virtue of their business and location of operation, competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the provisions of any of the antitrust laws. The eligibility of a director under the foregoing provision shall be determined by the

aggregate amount of the capital, surplus, and undivided profits, exclusive of dividends declared but not paid to stockholders, at the end of the fiscal year of said corporation next preceding the election of directors, and when a director has been elected in accordance with the provisions of this Act it shall be lawful for him to continue as such for one year thereafter.

When any person elected or chosen as a director or officer or selected as an employee of any bank or other corporation subject to the provisions of this Act is eligible at the time of his election or selection to act for such bank or other corporation in such capacity his eligibility to act in such capacity shall not be affected and he shall not become or be deemed amenable to any of the provisions hereof by reason of any change in the affairs of such bank or other corporation from whatsoever cause, whether specifically excepted by any of the provisions hereof or not, until the expiration of one year from the date of his election or employment. Oct. 15, 1914, c. 323, § 8, 38 Stat. 732; May 15, 1916, c. 120, 39 Stat. 121; May 26, 1920, c. 206, 41 Stat. 626; Mar. 9, 1928, c. 165, 45 Stat. 253; Mar. 2, 1929, c. 581, 45 Stat. 1536; Aug. 23, 1935, c. 614, § 329, 49 Stat. 717.

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IN THE

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OCTOBER TERM 1972

No. 71-1178

GULF STATES UTILITIES COMPANY, *Petitioner,*

v.

FEDERAL POWER COMMISSION,
CITY OF LAFAYETTE, LOUISIANA,
CITY OF PLAQUEMINE, LOUISIANA, *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE and BRIEF AMICUS CURIAE

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INDEX

	Page
Motion for leave to file brief amicus curiae	1
Brief for the Public Service Company of Indiana, Inc., amicus curiae	5
I. Antitrust laws and policy are not applicable	6
The Cities' position	6
The bulk power supply statutory objective	8
The objective remained unchanged throughout the legislative process	9
Plain repugnancy means supersedure of antitrust laws *pro tanto*	15
II. The cases relied on are inapposite, while apposite cases are ignored	16

CITATIONS

CASES:

California v. FPC, 369 U.S. 482 (1962)	17
Consolidated Gas, Elec. L. and P. Co. of Baltimore v. Pennsylvania W. and P. Co., 194 F.2d 89 (1952), certiorari denied, 343 U.S. 963 (1952)	20
Denver & Rio Grande Western R.R. v. United States, 387 U.S. 485 (1967)	17
First Iowa Hydro-Electric Cooperative v. FPC, 328 U.S. 152 (1946)	9
FPC v. Idaho Power Co., 344 U.S. 17 (1952)	9
FPC v. Southern California Ed. Co., 376 U.S. 205 (1964)	9
FMC v. Aktiebolaget Svenska Amerika Linien, 390 U.S. 238 (1968)	18
Marine Space Enclosures v. FMC, 137 U.S. App. D.C. 9, 420 F.2d 577 (1969)	18
McLean Trucking Co. v. United States, 321 U.S. 67 (1944)	17

Page

Municipal Electric Association of Massachusetts v. S.E.C., 134 U.S. App. D.C. 145, 413 F.2d 1052 (1969) 18
Northern Natural Gas Co. v. FPC, 130 U.S. App. D.C. 220, 399 F.2d 953 (1968) 17
Pennsylvania W. and P. Co. v. FPC, 343 U.S. 414 (1952) 19
Pennsylvania W. and P. Co. v. FPC, 89 U.S. App. D.C. 235, 193 F.2d 230 (1951), affirmed, 343 U.S. 414 (1952) 9, 19
Pennsylvania W. and P. Co. v. Consolidated Gas, E.L. and P. Co. of Baltimore, 184 F.2d 552 (1950), certiorari denied, 343 U.S. 963 (1952) 18, 19, 20
City of Pittsburgh v. FPC, 99 U.S. App. D.C. 113, 237 F.2d 741 (1956) 17
United States v. El Paso Natural Gas Co., 376 U.S. 651 (1964) 17
United States v. PUC of California, 345 U.S. 295 (1953) 18
United States v. Philadelphia Nat. Bank, 374 U.S. 321 (1963) 15, 18

STATUTES:

Administrative Procedure Act, 5 U.S.C. 554(e) 7, 16
Bank Merger Act of 1960, 12 U.S.C. 1828(c) 18
Federal Power Act, 41 Stat. 1063 (1920), 46 Stat. 797 (1930), 49 Stat. 838 (1935), as amended 16 U.S.C. 791-823:
Part I, Sections 1-23, 16 U.S.C. 792-823 9
Section 10(h), 16 U.S.C. 803(h) 9
Part II, Sections 201-209, 16 U.S.C. 824-824h ..9, 10
Section 202(a), 16 U.S.C. 824a(a) .2, 3, 6, 8, 10, 14-19
Section 202(b), 16 U.S.C. 824a(b) ..2, 3, 7, 11, 15, 16
Section 204, 16 U.S.C. 824c 2, 5, 17, 19
Section 204(a), 16 U.S.C. 824c(a) 8
Section 205, 16 U.S.C. 824d 2, 7, 16
Section 206(a), 16 U.S.C. 824e(a) 16
Section 207, 16 U.S.C. 824(f) 7, 16
Section 309, 16 U.S.C. 825h 7, 16
Section 314(a), 16 U.S.C. 825m(a) 18
Federal Water Power Act, 41 Stat. 1063 (1920), as amended, 41 Stat. 1353 (1921), 46 Stat. 197 (1930) 9

Page

Interstate Commerce Act, Section 20a 11, 17

Natural Gas Act, 52 Stat. 821-823 (1938), as amended, 15 U.S.C. 717-717w 17
Section 20(a), 15 U.S.C. § 717s(a) 18

Public Utility Act of 1935, 49 Stat. 847, 16 U.S.C. 803 . 9

Public Utility Holding Company Act of 1935, Section 10, 15 U.S.C. 79 18

MISCELLANEOUS:

Rayburn Bill, H.R. 5423, 74th Cong., 1st Sess. (1935):
Section 203(a) 10, 17

Wheeler Bill, S. 1725, 74th Cong., 1st Sess. (1935) ...10, 17
Section 202(a) 11
Section 203 11
Section 203(a) 10, 12
Section 203(b) 11
Section 204(a) 11, 12
Section 204(b) 11, 12

S. 2796, 74th Cong., 1st Sess., Senate Committee on Interstate Commerce, substitute for S. 1725, 74th Cong., 1st Sess. (1935)
Section 202(a) 12, 14, 15
Section 202(b) 15

Hearings, H.R. Committee on Interstate and Foreign Commerce on H.R. 5423, 74th Cong., 1st Sess. (1935) 10, 11, 12

Hearings, S. Committee on Interstate Commerce, on S. 1725, 74th Cong., 1st Sess. (1935) 11, 12

Report No. 621, S. Committee on Interstate Commerce, to accompany S. 2796, 74th Cong., 1st Sess. (1935) 13, 14

H.R. Report No. 1318, H.R. Committee on Interstate and Foreign Commerce, to accompany S. 2796, 74th Cong., 1st Sess. (1935) 15

H.R. Report No. 1903, Conference Report, to accompany S. 2796, 74th Cong., 1st Sess. (1935) 15

FPC, Regulations, Section 1.7(c) (18 C.F.R. 1.7(c)) ..7, 16

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BRIEF FOR PUBLIC SERVICE COMPANY OF INDIANA, INC., AMICUS CURIAE

Subject to the granting of the attached motion for leave to file, Public Service Company of Indiana, Inc., submits this brief *amicus curiae* to bring to the Court's attention a basic argument in support of petitioner on the first question presented (Pet. Br. p. 2), which is:

> Whether the FPC has a duty to investigate charges of Sherman Act violations under § 204 of the Federal Power Act.

I. ANTITRUST LAWS AND POLICIES ARE NOT APPLICABLE

PSCI's argument, stated in broad general terms, is that the legality of prevention of competition in bulk supply of electric power by the alleged company activities is governed by § 202(a) of the Federal Power Act, not by antitrust laws or policy. This argument has not been elucidated by petitioner or the FPC in this Court or at any stage in the proceedings that are here for review, nor has the support for it in the legislative history of the Power Act been shown.[1]

The Cities position.—Lafayette and Plaquemine, Louisiana ("Cities"), seek to stop certain alleged activities of Gulf States Utilities Company, by delaying its raising of needed capital. By means of those activities, according to the allegations, Gulf States, together with Louisiana Power and Light Company and Central Louisiana Electric Company,[2] has:

> (1) blocked construction by Louisiana Electric Cooperative, Inc. ("LEC")[3] of a competing (and duplicative) electric generating and transmission system designed to take over the supply of power to a number of distribution cooperatives that are now supplied by Companies through their interconnected and coordinated bulk power supply systems;

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[1] The closet approach is at Pet. Br., p. 16.

[2] The three companies are referred to herein collectively as "Companies."

[3] LEC is described in the opinion of the court below as a "generation and tranmission cooperative financed by the Rural Electrification Administration . . . [and] made up of twelve electric distribution cooperatives . . . ." *City of Lafayette, Louisiana* v. *FPC*, 454 F.2d 941, 944-45 (D.C. Cir. 1971); Pet., App. A, p. 5a).

(2) imposed conditions upon transmitting power for LEC, Dow Chemical Company, and Cities, and, by means thereof, has

(3) prevented carrying out an agreement among Cities, Dow, and LEC for interconnection and coordination of their generating systems to supply their combined loads.

In other words, Cities say that the Companies first prevented construction of a competing bulk power supply system and are now preventing establishment of a competing system that would use Companies' transmission facilities. (Pet. App. A, pp. 5a-7a). There is no allegation that there has been any prevention of access to the FPC for

(1) an order under § 202(b) of the Federal Power Act that would make available the benefits of regionally integrated bulk power supply systems,

(2) a § 207 order for adequate and sufficient service,

(3) a § 205 order for rates, facilities, contract, practices or services that are just, reasonable, and not unduly discriminatory or preferential, or

(4) a declaratory order under § 309 of the Power Act, the Administrative Procedure Act (5 U.S.C. § 554(e), and § 1.7(e) of the FPC Regulations (18 C.F.R. § 1.7(e)) to implement the purposes and standards of provisions of the Power Act.[4]

The Cities contend that the Companies' alleged activities amount to a conspiracy for bulk power supply

[4] For the cited sections of the Federal Power Act, see Pet., App. G, pp. 43a *et seq.*

monopolization that is illegal under the antitrust laws, and that the funds that Gulf States sought FPC authority to raise would be used in the course of, or in furtherance of, that conspiracy and, hence, for objects that do not meet the Power Act's § 204(a)[5] stipulation that the securities issue be "for some lawful object . . . and compatible with the public interest" (Cities' Mem. in Opp., p. 2).

The bulk power supply statutory objective.—The Cities are mistaken. Preventing competing independent bulk power supply is not in itself an unlawful object. It serves the public interest plainly stated by Congress in the Power Act. Indeed, Congress made it the duty of the FPC to *"promote and encourage"* noncompetitive regionally-integrated bulk power supply systems. Section 202(a)[6] provides:

> For the purpose of assuring an abundant supply of electric energy throughout the United States with the greatest possible economy and with regard to the proper utilization of natural resources, the Commission is empowered and directed to divide the country into *regional districts for the voluntary interconnection and coordination of facilities* for the generation, transmission and sale of electric energy. . . . Each district shall embrace an area which, in the judgment of the Commission, can economically be served by such interconnected and coordinated electric facilities. *It shall be the duty of the Commission to promote and encourage such interconnection and coordination within each district and between such districts.* . . . [Emphasis supplied.]

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[5] 49 Stat. 850 (1935); 16 U.S.C. 824c(a); Pet., App. G, p. 47a.

[6] *Id.*, 824a(a); Pet., App. G, pp. 44a-45a.

The objective remained unchanged throughout the legislative process.—The legislative history of the 1935 Federal Power Act shows that the objective of interconnection and coordination of bulk power supply facilities was embodied in the proposed Part II from its first introduction in Congress. It demonstrates that the intended integration and coordination was the antithesis of the competition that is the objective of the antitrust laws. It also reveals the deliberateness with which Congress embraced the abandonment of competition as a method of control of the bulk supply of electric power.

The adoption of this objective represented a marked difference from the approach taken by Congress in Part I of the present Federal Power Act, which was originally enacted in 1920 as the Federal Water Power Act.[7] There, in seeking the comprehensive development of the water power resources of the nation,[8] Congress in 1920 simplistically followed the approach of the Sherman Act and prohibited restraints of trade.[9]

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[7] 41 Stat. 1063, 16 U.S.C. 791-823.

[8] See *First Iowa Hydro-Electric Cooperative* v. *FPC*, 328 U.S. 152, 180 (1946).

[9] Part I of the present Federal Power Act, enacted in 1920 as the Federal Water Power Act for the licensing of hydro-electric projects, expressly made antitrust policies applicable (41 Stat. 1068 (1920), § 10(h); 16 U.S.C. 803). That section is inapplicable in the field of interstate commerce in electric energy which Congress first occupied with the enactment of the Federal Power Act in 1935 (Part II of Title II of the Public Utility Act of 1935, 49 Stat. 847-853; 16 U.S.C. 824-824h). *Pennsylvania W. and P. Co.* v. *FPC*, 89 U.S. App. D.C. 235, 242-243, 193 F.2d 230, 237-238 (1951), affirmed, 343 U.S. 414 (1952). Numerous decisions establish the necessity for reading the 1935 Part II independently of the 1920 Part I. See, *e.g.*, *United States* v. *P.U.C. of California*, 345 U.S. 295, 302-304 (1953); *FPC* v. *Idaho Power Co.*, 344 U.S. 17, 22-24 (1952); *FPC* v. *Southern California Ed. Co.*, 376 U.S. 205, 216-220 (1964).

But in 1935, representatives of the FPC, who drafted Part II of the originally proposed new Federal Power Act[10] for the regulation of interstate commerce in electric energy, set forth in their § 203(a) the first version of what was ultimately enacted as § 202(a). Their proposal was introduced in Congress as Title II of the Wheeler-Rayburn Bill.[11]

As they originally drafted Part II of that bill, it contained broad provisions to enable the FPC to achieve the objective of interconnection and coordination of bulk power supply facilities by compulsory means and to initiate action if necessary for that purpose.[12] FPC Commissioner Seavey submitted a pre-

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[10] Hearings, H.R. Committee on Interstate and Foreign Commerce, 74th Cong., 1st Sess., on H.R. 5423 (1935), pp. 57, 190, 400-401, 515.

[11] S. 1725, 74th Cong., 1st Sess. (1935) and H.R. 5423, 74th Cong., 1st Sess. (1935). Section 203.(a) of Part II in Title II of the bill read as follows: The Commission is empowered and directed to establish regional districts for the control of the production and transmission of electric energy, including interchange of energy, interconnection of facilities, and determination of the uses to be made of the facilities in such districts. Such control shall be designed to secure an abundant supply of electricity with the greatest possible economy and in the interest of the national defense and the proper utilization and conservation of natural resources. Such control, except in time of war or other emergency declared to exist by proclamation of the President, shall, as far as practicable, be by voluntary coordination under the supervision and direction of the Commission of the privately and publicly owned electric facilities in and between the several districts so established."

[12] The powers that would have been conferred by the original bills included:

(1) The power to compel a public utility to connect with, and to sell electric energy to, or exchange energy with, any other

pared memorandum at the ~~Senate~~ House Committee hearing stating with respect to § 203 of the bill:[13]

> This section furnishes the basis on which integrated regional systems of power generation and transmission may be built. . . . It also affords a means of eliminating the evils that accompany rivalries and jealousies between systems in *a field where competition has long been abandoned as a method of control.* Present companies would gain strength and stability through the increased use of their facilities and the elimination of wasteful duplication of plant and services. [Emphasis supplied.]

FPC Solicitor DeVane described the provisions for the interconnection and coordination of electric facilities into regionally integrated systems as, being to his mind, "the most important part of this bill."[14] He

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"person" without being limited to acting on an application by a State commission or a "person engaged in the transmission or sale of electric energy." S. 1725 and H.R. 5423 (*supra*, p. 10, n. 11), § § 203(b); compare § 202(b) of the Act as enacted, 49 Stat. 848 (1935), 16 U.S.C. 824a(b).

(2) Broad requirements for certificates of public convenience and necessity for all facilities and services subject to FPC jurisdiction and abandonments. *Id.* § § 204(a) and (b).

(3) A provision subjecting the regulated public utility to the obligation to serve any person on reasonable request, similar to the usual utility obligation in retail service. *Id.*, § 202(a).

(4) A "common carrier" type of obligation to transmit energy for other "persons." *Id.*, § § 203(b).

[13] Hearings (*supra*, p. 10, n. 10) pp. 383-385.

[14] Hearings (*supra*, p. 10, n. 10), p. 501. Mr. DeVane later went on to explain why: ". . . [W]ith proper interconnections and the formation of regional districts standby facilities can be reduced 15 per cent on the average and not to exceed 20 per cent, which will result in very substantial savings to the public." (*Id.*, p. 2148; see also pp. 269-274, 2152-3, 2165-8; and Hearings, S. Committee on Interstate Commerce, on S. 1725, 74th Cong., 1st Sess. (1935), pp. 238-239, 245-246, 257-258, 272-274, 797-800.)

contrasted it with the Interstate Commerce Act:[15]

> There is nothing in this bill . . . that provides for competition. It is entirely silent in that respect and differs from the language of the Interstate Commerce Commission. . . .
>
> There, as you recall, Congress provided that competition should be preserved and if Congress should desire to establish competition in this industry it should be written in any legislation adopted by Congress.

Questioned whether the elimination of competition was part of a conception of making the whole electric industry into a single entity (as charged by some opponents of the bill) so that it would be more readily subject to "nationalization,"[16] Mr. DeVane answered that there was already "practically no duplication in the field."[17]

In the course of the bill through Congress the language of § 203(a)[18] was altered, but without changing the purpose to achieve non-competitive regionally integrated bulk power supply. Most of the provisions for compulsion[19] were eliminated because it was felt that

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[15] H. Hearings (*supra*, p. 10, n. 10), p. 554; see also p. 385.

[16] See, *e.g.*, S. Hearings (*supra*, p. 11, n. 14), p. 271; H. Hearings (*supra*, p. 10, n. 10) pp. 436, 444-45; *cf.* pp. 855-56, 59.

[17] H. Hearings (*supra*, p. 10, n. 10), p. 2148.

[18] Renumbered § 202(a) in the Senate Committee substitute bill, S. 2796, 74th Cong., 1st Sess. (1935).

[19] The provisions of S. 1725 referred to above, pp. 10-11, n. 12, for certificates of public convenience and necessity, and imposing public utility and common carrier type obligations were eliminated in S. 2796.

in this first Federal exercise of power over the electric industry reliance should be placed on voluntary action and the enlightened self-interest of the utilities. These changes were made initially in a substitute bill [20] reported out by Senator Wheeler's Committee.[21]

[20] S. 2796, 74th Cong., 1st Sess. (1935).

[21] S. Report No. 621, 74th Cong., 1st Sess. (1935), p. 19. The report stated (pp. 17-18, 49):

"The necessity for Federal leadership in securing planned coordination of the facilities of the industry which alone can produce an abundance of electricity at the lowest possible cost has been clearly revealed in the recent reports of the Federal Power Commission, the Mississippi Valley Committee, and the National Resources Board. Assertion of the power of the Federal Government in this direction becomes the more important at the time when the Federal Government is compelling the reorganization of holding companies along regional lines. The new part 2 of the Federal Water Power Act seeks to bring about the regional coordination of the operating facilities of the interstate utilities along the same lines within which the financial and managerial control is limited by title I of the bill."

* * * * * *

"SECTION 202. INTERCONNECTION AND COORDINATION OF FACILITIES

"This section sets up the machinery for the promotion of the coordination of electric facilities. By subsection (a) the Commission is directed to divide the country into regional districts, consisting of areas which can economically be served by interconnected and coordinated facilities. Within each such district and between such districts the Commission is directed to secure such interconnection and coordination by voluntary action as far as practicable. To the extent that this action is to be voluntary, public as well as private plants are included. Before establishing any district the Commission is to give notice to the State commissions and afford them an opportunity to present their recommendations.

"Under this subsection the Commission would have authority to work out the ideal utility map of the country and supervise the development of the industry toward that ideal. The committee is confident that enlightened self-interest will lead the utilities to cooperate with the Commission and with each other in bringing about the economies which can alone be secured through the

The Report was careful to make clear that the elimination of the compulsory features was not an abandonment of the objective of regional interconnection and coordination of bulk power supply facilities, for it said that while such provisions "may ultimately be found to be desirable, the committee does not think that they should be included in this first exercise of Federal power over electric companies. . . ."[22] Indeed, Congress' increased reliance on voluntary action for achievement of the objective necessarily emphasizes its intention that the antitrust laws not apply, for their applicability would discourage or prevent the desired voluntary actions.

The House Committee manifested its adherence to the original objective of the provision by strengthening 202(a). It changed its wording so as to expressly lay upon the FPC the "duty to promote and encourage

---

planned coordination which has long been advocated by the most able and progressive thinkers on this subject.

"When interconnection cannot be secured by voluntary action, subsection (b) gives the Commission limited authority to compel interstate utilities to connect their lines and sell or exchange energy. The power may only be invoked upon complaint by a State commission or a utility subject to the act. The Commission is given authority to prescribe the terms under which the interconnection and exchange are to be carried on, including the price to be paid for the service.

"Subsection (c) gives the Commission a much broader and more complete authority to compel the connection of facilities and the generation, delivery, or interchange of energy during times of war or other emergency. This is a temporary power designed to avoid a repetition of the conditions during the last war, when a serious power shortage arose. Drought and other natural energencies have created similar crises in certain sections of the country; such conditions should find a Federal agency ready to do all that can be done in order to prevent a breakdown in electric supply."

[22] *Id.*, p. 19.

such interconnection and coordination . . . by voluntary action of the private and public owners of such electric facilities." [23] It also broadened the compulsory power of the FPC under § 202(b). Where the Senate had limited that power to interconnections between interstate utilities, the House Committee "saw no reason for denying the same privilege to a company engaged in intrastate commerce." [24]

The House amendment of § 202(a) was adopted in the Conference Committee substitute, "with minor modifications." [25] The broadening of § 202(b) by the House was retained.[26]

Plain repugnancy means supersedure of antitrust laws pro tanto.—That which § 202(a) makes it the FPC's explicit "duty . . . to promote and encourage" cannot be unlawful under the antitrust laws. The repugnancy is plain [27] and the legislative history to which we have referred confirms Congress' intention that the anti-trust laws should not apply.

The lawfulness of the Companies' alleged activities was, therefore, not properly called in question by Cities' charges of violations of the antitrust laws. If facts could properly be alleged showing that there is a question whether

(1) the Companies' bulk power supply facilities (or the terms upon which sales or exchanges

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[23] See H. Report No. 1318, 74th Cong., 1st Sess., p. 74.

[24] H. Report No. 1318, 74th Cong., 1st Sess. (1935), p. 28.

[25] H. Report No. 1903, 74th Cong., 1st Sess. (1935, p. 74.

[26] *Id.*, pp. 48-49.

[27] Compare *United States* v. *Philadelphia Nat. Bank*, 374 U.S. 321, 350-351 (1963).

of energy are available to the Cities) satisfy the requirements and standards of § 202(a) and (b),

(2) the service rendered or offered is inadequate or insufficient under § 207,[28] or

(3) a rate, charge or classification (or facilities, rule, regulation, practice or contract affecting or relating thereto) is unjust, unreasonable, or unduly discriminatory or preferential within the meaning of § 205,[29]

such questions might appropriately be raised by an application to the FPC under § 202(b), or by complaint under § 206(a)[30] or 207[31] or by an application for a declaratory order under § 309 of the Power Act, the Administrative Procedure Act (5 U.S.C. § 554(e)), and § 1.7(c) of the FPC Regulations (18 C.F.R. § 1.7 (c)). But no question outside the scope of the FPC's regulation under these sections is presented by allegations of prevention of the establishment of a competing bulk power supply system. Until and unless such a question is presented, no question of applicability of the antitrust laws can be involved.

II. THE CASES RELIED ON ARE INAPPOSITE. WHILE APPOSITE CASES ARE IGNORED

In the light of the foregoing, the cases relied upon by the Cities in their petition, and by the court below, are plainly inapposite.

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[28] 49 Stat. 853 (1935); 16 U.S.C. 824f.

[29] 49 Stat. 851 (1935); 16 U.S.C. 824d; Pet., App. G, pp. 49a-50a.

[30] 49 Stat. 852 (1935); 16 U.S.C. 824e(a); Pet. App. G, pp. 51a-52a.

[31] 49 Stat. 853 (1935); 16 U.S.C. 824(f).

The court rested its decision mainly on *Denver & Rio Grande Western R.R.* v. *United States,* 387 U.S. 485 (1967),[32] saying that § 204 of the Power Act "is almost identical with the pertinent provisions of § 20a of the Commerce Act. . . ."[33] But, as we have seen, this overlooks the distinction FPC Solicitor DeVane pointed out when the Wheeler-Rayburn Bill was under consideration by Congress. He contrasted what is now § 202(a), which was intended, *inter alia,* as "a means of eliminating the evils that accompany rivalries and jealousies between systems in a field where competition has long been abandoned as a method of control", with the Interstate Commerce Act (*supra,* pp. 11-12).[34]

McLean Trucking Co. v. *United States,* 321 U.S. 67 (1944), cited by the court below is similarly inapposite.

The absence of any provision in the Natural Gas Act[35] and anything in its history comparable to that of § 202(a), (*supra,* p. 8), makes the decisions[36] under that Act that were relied on by the court below,[37]

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[32] 454 F.2d at 948-953; Pet., App. A, pp. 12a, n. 9, 14a-20a, 22a. This case is also cited by Cities, Mem. in Opp. p. 3.

[33] 454 F.2d at 949; Pet., App. A, p. 14a. The Court below quotes from § 202(a) in another connection (454 F.2d at p. 951; Pet., App. A, pp. 18a-19a) but nowhere recognizes the basic question of its effect on the applicability of the antitrust laws.

[34] 454 F.2d at 948, n. 9; Pet., App. A, p. 13a, n. 9.

[35] 52 Stat. 821-833 (1938), as amended; 15 U.S.C. 717-717w.

[36] *E.g., United States* v. *El Paso Natural Gas Co.,* 376 U.S. 651 (1964); *California* v. *FPC,* 369 U.S. 482 484-485 (1962); *Northern Natural Gas Co.* v. *FPC,* 130 U.S. App. D.C. 220, 226, 399 F.2d 953, (1968); *City of Pittsburgh* v. *FPC,* 99 U.S. App. D.C. 113, 237 F.2d 741 (1956).

[37] 454 F.2d at 948 n. 8 and 9, 953, n. 25 and 27; Pet., App. A, p. 13a, n. 9, p. 23a, n. 25 and 27.

and by the Cities in opposing the petition for certiorari,[38] wholly inapposite.[39]

Similar considerations apply to the decision under the Public Utility Holding Company Act of 1935, § 10, 15 U.S.C. 79, in *Municipal Electric Association of Massachusetts* v. *SEC,* 134 U.S.App.D.C. 145, 413 F.2d 1052 (1969),[40] for that Act, too, has no provision like § 202(a) of the Power Act. So, also, to the decision in *United States,* v. *Philadelphia National Bank,* 374 U.S. 321 (1963), under the Bank Merger Act of 1960 (12 U.S.C. § 1828(c)).[41]

The Federal Maritime Commission cases cited by the court below[42] are also inapposite. The antitrust law immunity that the statute in each of those cases gives to agreements approved by that Commission is

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[38] Cities Mem., p. 3.

[39] Indeed, omission from § 314(a) of the Power Act (16 U.S.C. § 825m(a)) of any provision for referring evidence of apparent violations of antitrust laws to the Attorney General, like that in § 20(a) of the Natural Gas Act (15 U.S.C. § 717s(a))—which puzzled the court below (454 F.2d at 953, n. 27; Pet., App. A., p. 23a, n. 27)—may be a corroborative indication of the highly limited scope of the antitrust laws in regulation under the Power Act.

[40] Cited by Cities, Mem. in Opp., p. 3, and by the court below, 454 F.2d 948, n. 9; Pet. App. 13a n. 9.

[41] Cited by the court below, 454 F.2d at 948, n. 9; Pet., App. A, p. 13a, n. 9.

[42] *FMC* v. *Aktiebolaget Svenska Amerika Linien,* 390 U.S. 238 (1968); *Marine Space Enclosures* v. *FMC,* 137 U.S.App. D.C. 9, 17f, 420 F.2d 577, 585 (1969). Cited by the court below, 454 F.2d at 948, n. 9; Pet., App. A, p. 13a, n. 9. Cited by cities, Mem. in Opp., p. 3. *Pennsylvania W. and P. Co.* v. *Consolidated Gas, E.L. and P. Co. of Baltimore,* 184 F.2d 552 (1950), *certiorari denied,* 343 U.S. 963 (1952).

subject to an almost circular provision governing Commission disapproval of any agreement found to be "contrary to the public interest." This "public interest" concept is unlimited by any statutory provision like § 202(a), and the decisions upholding consideration of antitrust principles as part of such unlimited "public interest" concept are obviously inapplicable where § 202(a) is controlling.

This completes the "host of decisions" cited by the court below to support relevancy of the asserted anticompetitive purpose or consequence of the authorization Gulf States sought under § 204. Decisions under the Power Act are conspicuous by their absence from the court's list. But attention may be called to *Pennsylvania Water and Power Company* v. *FPC*, 343 U.S. 414, 421-423 (1952), and to the District of Columbia Circuit's decision that was there affirmed (89 U.S.App. D.C. 235, 237-243, 193 F.2d 230, 233-238). In that case, although an interconnected and coordinated generating and transmission arrangement had previously been held illegal by the Fourth Circuit under the antitrust laws (in a case to which the FPC was not a party),[43] the FPC was there sustained in nevertheless ordering that arrangement continued. This Court relied on § 202(a) (343 U.S. at 423), as had the District of Columbia Circuit (193 F.2d at 237). There have been no subsequent decisions under the Power Act to detract from the authority of those decisions.

It is to be noted that the antitrust law violations here alleged, like those involved in the *Penn Water* case run to interconnected and coordinated systems

[43] *Consolidated Gas, E.L. and P. Co. of Baltimore* v. *Pennsylvania W. and P. Co.*, 184 F.2d 552 (1950), *certiorari denied*, 343 U.S. 963 (1952).

operations, not to the managerial freedom of those involved. Compare 343 U.S. at pp. 421-422. Thus the questions do not arise here on which the Fourth Circuit (in *Consolidated Gas Elec. L. and P. Co. of Baltimore* v. *Pennsylvania W. and P. Co.*, 194 F.2d 89 (1952) *certiorari denied*, 343 U.S. 963 (1952)) differed with the District of Columbia Circuit decision in *Penn Water* (193 F.2d 230). See *supra*, p. 19.

CONCLUSION

For the foregoing reasons it is submitted that the decision of the Court of Appeals should be reversed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1178

GULF STATES UTILITIES COMPANY, *Petitioner*

v.

FEDERAL POWER COMMISSION
CITY OF LAFAYETTE, LOUISIANA
CITY OF PLAQUEMINE, LOUISIANA, *Respondents*

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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MOTION OF THE AMERICAN PUBLIC POWER ASSOCIATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF

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SUBJECT INDEX

Page

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE 1

BRIEF AMICUS CURIAE 5

Interest of This Amicus Curiae 5

Question Presented 6

Statement of the Case 7

The Federal Power Commission's Decision 7, 8, 9

The Court of Appeals Opinion 9, 10

Argument 10

I.

Antitrust claims are relevant under § 204(a)'s "public interest" and "lawful object" language as they are under every other section of Part II of the Federal Power Act 10

II.

This Court and the lower federal courts have made it plain that the antitrust laws must complement each individual agency's statutory mandate, including that of the Federal Power Commission 12

III.

This Court has held practices analogous to the practices complained of by the Cities to be the basis for a valid cause of action as a violation of the antitrust laws 17

Conclusion 19

TABLE OF AUTHORITIES CITED

CASES:

California Motor Transport Company v. *Trucking Unlimited*, 404 U.S. 508 (1972) 17, 18, 19

City of Lafayette, Louisiana v. *Federal Power Commission*, 454 F.2d 941 (D.C. Cir. 1971) ..2, 9, 16, 17, 18

Denver & Rio Grande Western Railroad Company v. *United States*, 387 U.S. 485 (1967) 12, 13, 14, 15

Page

Federal Maritime Commission v. *Aktiebolaget Svenska Amerika Linien*, 390 U.S. 238 (1968) 14, 15
Federal Power Commission v. *Southern California Edison Company*, 376 U.S. 205 (1964) 15
McLean Trucking Company v. *United States*, 321 U.S. 67 (1944) 14, 15
National Broadcasting Company v. *United States*, 319 U.S. 190 (1943) 14, 15
Northern Natural Gas Company v. *Federal Power Commission*, 399 F.2d 953 (D.C. Cir. 1968) 15, 16
Otter Tail Power Company v. *United States*, Supreme Court of the United States, Docket No. 71-991, October Term, 1971 11
Pacific Power & Light Company, 27 F.P.C. 623 (1962) 13
Gulf States Utilities Company, 44 F.P.C. 1524 (1970) 2, 9

STATUTES:

Federal Power Act

Section 201(a) (16 U.S.C. § 824(a)) 10, 11
Section 202 (16 U.S.C. § 824a) 11
Section 203 (16 U.S.C. § 824b) 11
Section 204 (16 U.S.C. § 824c) 2, 3, 6, 7, 8, 10, 11, 12, 13, 16
Section 205 (16 U.S.C. § 824d) 11
Section 206 (16 U.S.C. § 824e) 11
Section 207 (16 U.S.C. § 824f) 11

Interstate Commerce Act
Section 20(a) (49 U.S.C. § 1 *et seq.*) 12, 13

Shipping Act of 1916
Section 15 (46 U.S.C. § 801 *et seq.*) 14

MISCELLANEOUS:

Brief for F.P.C. as Amicus Curiae at 10, *Otter Tail Power Company* v. *United States*, Supreme Court of the United States, Docket No. 71-991, October Term, 1971 11

FPC, 1970 NATIONAL POWER SURVEY (1971) 6

Letter from the Attorney General of the United States, dated August 18, 1972, 37 Fed. Reg. 17775 (1972) 17

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On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

MOTION OF THE AMERICAN PUBLIC POWER ASSOCIATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

The American Public Power Association respectfully moves this Court for leave to file a brief in this case as *amicus curiae*. The consent of the attorney for respondent Cities of Lafayette and Plaquemine, Louisiana, and of the Solicitor General of the United States has been obtained, but the attorney for the petitioner Gulf States Utilities Company has refused to consent.

The applicant, the American Public Power Association (APPA), is a national service organization. It has an interest in this case in that it represents more than 1,400 local, publicly owned electric utilities in 48 States, Puerto Rico, the Virgin Islands, and Guam. The Association's membership includes municipalities, public utility districts, cooperatives, and other consumer-owned public power systems. Many of these publicly owned utilities are affected directly and seriously by the decision in the court below.

The basic issue in this case is the extent of the duty of the Federal Power Commission to consider the impact of the antitrust laws of the United States in deciding whether or not to approve issuance of securities by public utility companies, pursuant to § 204(a) of the Federal Power Act, 16 U.S.C. § 824c(a). The Commission decided that it had no such responsibility, 44 F.P.C. 1524, 1526 (1970), contrary to the contentions of the Cities of Lafayette and Plaquemine, Louisiana. The Court of Appeals of the District of Columbia, on appeal, remanded the case to the Federal Power Commission and required that agency to take a "hard look" at the antitrust implications of Petitioner Gulf States' proposal to sell $30 million of first mortgage bonds. The Court of Appeals called the Commission's failure to give consideration to antitrust aspects of the problem before it "tunnel vision." 454 F.2d 941, 951 (D.C. Cir. 1971).

The applicant American Public Power Association has an interest in the rights of respondent Cities to a hearing before the Federal Power Commission on their allegations of an unlawful conspiracy to suppress competition in violation of the antitrust laws. These allegations were relevant to the Federal Power Commis-

sion's authorization of a securities issue which will have the effect of releasing revenues for continuation of anticompetitive practices, these being revenues which, absent the securities issue, would be committed to service of the short-term notes which are being thus refunded.

This right to a hearing derives from the "lawful object" and "public interest" language of § 204(a) of the Federal Power Act.

The American Public Power Association respectfully requests this Court to grant it permission to file its brief *amicus curiae* in this case.

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---

BRIEF OF THE AMERICAN PUBLIC POWER ASSOCIATION AS AMICUS CURIAE

INTEREST OF THIS AMICUS CURIAE

The American Public Power Association is a national service organization representing over 1,400 local, consumer-owned electric utility power systems in 48 States, Puerto Rico, the Virgin Islands and Guam.

They range in size from very large systems, such as the Department of Water and Power of the City of Los Angeles and Seattle City Light, down to the smallest of the consumer-owned systems, serving small rural communities. The Association's membership includes municipalities, public utility districts, cooperatives, and other consumer-owned public power systems.[1]

The right of Respondent Cities to a hearing before the Federal Power Commission on their allegations of an unlawful conspiracy to suppress competition in violation of the antitrust laws is of vital importance to the member electric power systems of the American Public Power Association. In our view, local, consumer-owned electric utilities have the right, under § 204(a) of the Federal Power Act, to a hearing to offer evidence that the Federal Power Commission is about to authorize the financing scheme of an investor-owned public utility, the proceeds of which will be used to support activities illegal under the federal antitrust laws. But this right was denied by the Federal Power Commission in the case at bar.

QUESTION PRESENTED

Does Section 204(a) of the Federal Power Act require the Federal Power Commission to consider allegations that an issuer of securities, who requests the Commission's approval of the issuance and sale thereof, is guilty of continuing antitrust violations, which will be facilitated in consequence of the proposed sale?

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[1] The NATIONAL POWER SURVEY of the Federal Power Commission (1970) reported (p. I-1-10) that of the 3,445 systems serving the country (excluding Alaska and Hawaii), more than 2,000 were publicly owned, principally by municipalities, and another 960 were rural electric cooperatives.

STATEMENT OF THE CASE

The Federal Power Commission's Decision

On October 12, 1970, Gulf States Utilities Company, which is engaged in generating, transmitting and selling electricity at wholesale and retail in Louisiana and Texas, applied to the Federal Power Commission, as required by §204(a) of the Federal Power Act, 16 U.S.C. § 824c(a), for authorization to sell $30 million of first mortgage bonds at competitive bidding. The application by Gulf States stated that the proceeds from the bond sale would be used to pay a portion of its commercial paper and short-term notes.

On November 2, 1970, the Cities of Lafayette and Plaquemine, Louisiana (Cities), filed a protest and petition to intervene in this proceeding, alleging that Gulf States had violated the antitrust laws, the Federal Power Act, and the Public Utility Holding Company Act. The Cities alleged that the proceeds of the bond issue would enable Gulf States to continue activities violative of the antitrust laws, by making it possible for the Company to devote funds to these predatory activities which funds otherwise would be used to redeem its short-term notes, absent the proposed securities issue.

Specifically, the Cities alleged that Gulf States, Louisiana Power & Light Company, and Central Louisiana Electric Company (Companies) were engaged in a conspiracy to defeat and suppress an interconnection and pooling agreement between the Cities, Dow Chemical Company (DOW) and Louisiana Electric Cooperative, Inc. (LEC), executed in August 1968.

They alleged that, in September 1964, the Rural Electrification Administration (REA) authorized a $56.5 million loan to LEC for construction of a generating

station and 1,611 miles of transmission lines. The Cities contended that the Companies, by means of repetitive and frivolous litigation, a public relations drive, and a lobbying effort against the REA loan, succeeded in delaying disbursement of the $56.5 million loan until the new REA Administrator was sworn in, in January 1969. As a result of this 5-year delay, from September 1964 until January 1969, the Cities, DOW, and LEC were prevented from going ahead with their interconnection and pooling agreement. In light of the rise in costs during the 5-year delay, the new REA Administrator advanced funds only for the LEC generating station and not for the transmission lines. LEC was forced to negotiate with the Companies for use of their transmission lines. The Cities contended that the conspiracy to defeat the pooling agreement continued during the negotiations between LEC and the Companies. The Cities alleged further that the Companies refused to supply transmission services between the Cities, DOW and LEC, demanded that LEC limit its power capacity, and required that all further power needs of LEC be supplied by the Companies.

The Cities requested that the Gulf States application to the Federal Power Commission for approval of its securities issue be set down for a hearing, unless Gulf States agreed to halt the alleged violations and remedy the damage done.

On December 3, 1970, the Federal Power Commission denied the Cities' application for a hearing and authorized Gulf States to issue the bonds. The Commission stated that the alleged violations were irrelevant to a Section 204(a) proceeding:

> "The matters asserted and activities alleged in the filed protest and petition to intervene by the Cities of Lafayette and Plaquemine, Louisiana, are

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irrelevant to the purpose of issuing bonds to refund short-term indebtedness heretofore authorized by this Commission." 44 F.P.C. 1524, 1526 (1970).

On December 16, 1970, the Cities filed a petition for rehearing, asking the Commission to clarify whether it considered the Cities' antitrust allegations irrelevant to Section 204 generally, or irrelevant because a refunding issue instead of new funding was involved. The Commission denied the Cities petition for a rehearing on January 13, 1971, without clarifying its prior decision.

The Court of Appeals Opinion

The Court of Appeals held that the Federal Power Commission had not fulfilled its duty to investigate the relevancy of the bond issue to the alleged antitrust violations and owed a "hard look" to the allegations of the Cities on remand. 454 F.2d at 954. The court held, *inter alia,* (454 F.2d at 953-54):

> "We do not consider what ruling we would make on the basis of such a position if thought through and embodied in FPC policy and findings. It suffices for present purposes to say that the FPC's terse and cryptic statement did not comply with the requirement we see in *Denver & Rio Grande,* that the agency's reason for denying or deferring hearing of anticompetitive issues be clear on the record, meaningful in findings or discussion.
>
> "Accordingly we deem it necessary to remand the order under review.
>
> * * *
>
> "We have been at pains to set forth the latitude available to the agency in approach and procedure to obviate any concern that this court seeks to interfere with its exercise of discretion. What the

court does require is that the agency take a 'hard look' at problem areas." [Footnotes and citations omitted.]

I. ANTITRUST CLAIMS ARE RELEVANT UNDER § 204(a)'s "PUBLIC INTEREST" AND "LAWFUL OBJECT" LANGUAGE AS THEY ARE UNDER EVERY OTHER SECTION OF PART II OF THE FEDERAL POWER ACT

The declaration of policy governing Part II of the Federal Power Act is contained in Section 201(a), 16 U.S.C. § 824(a), which states:

> "It is hereby declared that the business of transmitting and selling electric energy for ultimate distribution to the public is *affected with a public interest,* and that Federal regulation of matters relating to generation to the extent provided in this Part and the Part next following and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary *in the public interest,* such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States." (Emphasis added.)

Section 204(a), involved here, prohibits any securities issue by a public utility without prior authorization of the Commission. Section 204(a) allows the Commission to authorize a securities issue:

> ". . . if it finds that such issue or assumption (a) is for some *lawful object,* within the corporate purposes of the applicant and compatible with the *public interest,* which is necessary or appropriate for or consistent with the proper performance by the applicant of service as a public utility and which will not impair its ability to perform that service, and (b) is reasonably necessary or

appropriate for such purposes." 16 U.S.C. § 824c (a). (Emphasis added.)

Note the almost exact repetition of the "public interest" mandates in Sections 201 and 204.

This "public interest" language in Section 201 is construed by the Commission (properly, we think) as compelling consideration of antitrust issues in proceedings to order an interconnection under Section 202, to approve acquisitions or mergers under Section 203, to review rates under Sections 205 and 206, and to review charges of inadequate service under Section 207. The Commission insists, however, that this common thread of the strong public interest, starting at Section 201 and ending at Section 207, while compelling consideration of antitrust factors in proceedings in all sections except Section 204, suddenly and inexplicably unravels in mid-course at that section and becomes inoperative there, and only there, resuming course in Section 205.[2]

The antitrust laws are a towering feature of the public interest, and Section 201, commanding the Commission to scrutinize the transactions over which it has authority in the light of the public interest, certainly did not turn that light off in the single case of a collision between a utility's financing scheme and the antitrust laws.

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[2] Indeed, the Commission's brief in Otter Tail Power Company v. United States, Supreme Court of the United States, Docket No. 71-991, October Term, 1971, page 10, urges that the Commission has plenary jurisdiction over antitrust issues. There is no rational explanation for claiming full antitrust jurisdiction in one case before this Court, while simultaneously abdicating this same responsibility under Section 204 in the present cause.

The raising of new money for the violation of the antitrust laws is not a "lawful object." It is incongruous that the Federal Power Commission recognizes its responsibility to prevent abuse of the antitrust laws by investor-owned utilities after a project is financed, yet fails to find in Section 204 authority to cut off such abuses at the pocket.

II. THIS COURT AND THE LOWER FEDERAL COURTS HAVE MADE IT PLAIN THAT THE ANTITRUST LAWS MUST COMPLEMENT EACH INDIVIDUAL AGENCY'S STATUTORY MANDATE, INCLUDING THAT OF THE FEDERAL POWER COMMISSION

This Court has held consideration of antitrust issues relevant to a federal agency's exercise of its statutory authority under an identical statute in a similar factual situation.

In *Denver & Rio Grande Western Railroad Company* v. *United States*, 387 U.S. 485 (1967), the petitioners, acting under § 20a of the Interstate Commerce Act, a statute which bears nearly word for word similarity to § 204(a) of the Federal Power Act, had protested Interstate Commerce Commission approval of a stock transaction between a railway express company and a motor carrier.

In *Denver & Rio Grande*, this Court reversed the court below and remanded the case to the Interstate Commerce Commission for consideration of antitrust issues. It said:

> "... the broad terms 'public interest' and 'lawful object' negate the existence of a mandate to the ICC to close its eyes to facts indicating that the transaction may exceed limitations imposed by other relevant laws. Common sense and sound administrative policy point to the conclusion that

such broad statutory standards require at least some degree of consideration of control and anti-competitive consequences when suggested by the circumstances surrounding a particular transaction. 387 U.S. at 492.

* * *

"... when the ICC exercises its discretion to approve issuances without first considering important control and competition issues, the reviewing court must closely scrutinize its action in light of the ICC's statutory obligations to protect the public interest and to enforce the antitrust laws." 387 U.S. at 498.

As in the case now before this Court, the parties seeking to intervene in the federal agency's proceedings raised the substantial issue of possible antitrust violations. 387 U.S. at 490. They pointed out the necessity of an administrative hearing to examine the anti-competitive effects of the proposed stock issuance under the "public interest" and "lawful object" standards of § 20a of the Interstate Commerce Act. The contentions of the Cities in the present case are identical to those of the *Denver and Rio Grande* intervenors.

Equally significant for the present cause is the fact that § 204(a) of the Federal Power Act was modeled on the statute interpreted in *Denver & Rio Grande.* The Federal Power Commission itself has held that § 204(a) criteria for approval of security issues were "copied almost verbatim from Section 20a of the Interstate Commerce Act," *Pacific Power & Light Company,* 27 F.P.C. 623, 627 (1962). Thus *Denver & Rio Grande* stands as doubly important precedent in this case: the facts are nearly the same and the law is the same.

The Federal Power Commission's administrative conduct in this case exceeds, in terms of unreflective and insensitive brushing off of the antitrust laws, the agency action which this Court held not permissible in *Denver & Rio Grande.*

In *Federal Maritime Commission* v. *Aktiebolaget Svenska Amerika Linien,* 390 U.S. 238 (1968), this Court unanimously held that § 15 of the Shipping Act of 1916, 46 U.S.C. § 801 *et seq.,* as amended, required the Federal Maritime Commission to employ the antitrust laws as "an appropriate refinement of the statutory 'public interest' standard." 390 U.S. at 246. In determining whether the limited immunity from the antitrust laws given to conferences of shippers in the Shipping Act removed the antitrust laws from the Federal Maritime Commission's purview altogether, this Court found that the antitrust concepts were "intimately involved" in the standards Congress set up to regulate shipping. 390 U.S. at 245.

In *McLean Trucking Company* v. *United States,* 321 U.S. 67 (1944), this Court upheld the merger of eight motor carriers which had been authorized by the Interstate Commerce Commission. Mr. Justice Rutledge found that the agency's duty was a dual one, both to its statutory mandate and to the antitrust laws:

> ". . . the Commission must estimate the scope and appraise the effects of the curtailment of competition which will result from the proposed consolidation and consider them along with the advantages of improved service, safer operation, lower costs, etc., to determine whether the consolidation will assist in effectuating the over-all transportation policy." 321 U.S. at 87.

This Court similarily upheld agency consideration of the antitrust laws in *National Broadcasting Company*

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v. *United States,* 319 U.S. 190 (1943). The Court affirmed the regulation of chain broadcasting by the Federal Communications Commission, upholding the power of the Commission to deny a license to an applicant because he violated the antitrust laws. 319 U.S. at 222. The Court emphasized the agency's duty to consider the antitrust statutes:

> "By clarifying . . . the scope of the Commission's authority in dealing with persons convicted of violating the anti-trust laws, Congress can hardly be deemed to have limited the concept of 'public interest' so as to exclude all considerations relating to monopoly and unreasonable restraints upon commerce." 319 U.S. at 223.

Denver & Rio Grande, Aktiebolaget, McLean Trucking and *National Broadcasting* demonstrate the conviction of the courts that there is an area of overlap between the antitrust laws and the federal agency's specific assignment.

In the grey area where antitrust considerations and the agency mandate are both found, an agency like the Federal Power Commission is obliged to give effect to both legal schemes.

This concept of complementary regulation was specifically applied to the Federal Power Commission in *Northern Natural Gas Company* v. *Federal Power Commission,* 399 F.2d 953 (D.C. Cir. 1968). There, the court considered a challenge by gas companies to an order of the Federal Power Commission under the Natural Gas Act[3] authorizing the construction and

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[3] The judicial history of that Act closely parallels that of the Federal Power Act. F.P.C. v. Southern California Edison Co., 376 U.S. 205, 211 (1964).

operation of a natural gas pipeline. The Court of Appeals held that the Federal Power Commission's order would have serious anticompetitive effects and remanded the proceedings to the Commission, saying:

> "Although the [Federal Power] Commission is not bound by the dictates of the antitrust laws, it is clear that antitrust concepts are intimately involved in a determination of what action is in the public interest, and therefore the [Federal Power] Commission is obliged to weigh antitrust policies." 399 F.2d at 958.

In *Northern Natural Gas* the Federal Power Commission was "obliged to make findings related to the pertinent antitrust policies, draw conclusions from the findings, and weigh these conclusions along with other important public interest considerations." 399 F.2d at 961. "Public interest" has the same meaning in the twin statutes administered by the Federal Power Commission.

Judge Leventhal's cogent sentence in the opinion below expresses the Commission's obligation under Section 204(a) in these memorable terms:

> "However it is a fair consensus of the cases cited that the nation's profound and pervasive devotion to competition as a fundamental economic policy, and conviction that the public interest is disadvantaged when private enterprises are permitted to engage in anti-competitive agreements and restraints, is applicable at least presumptively even in the case of monopolies or quasi-monopolies characterized by various degrees of government control and protection, subject of course to offset or rebuttal on analysis by the cognizant agency." *City of Lafayette, Louisiana* v. *FPC,* 454 F.2d 941, 948-49 (D.C. Cir. 1971).

The question here is not whether the Company was indeed guilty of violation of the antitrust laws, but whether the Commission should have heard evidence on the alleged violation.

The effect of the Commission's negative decision of this issue, if sustained, is that the proposed use of funds by a public utility for the violation of the antitrust laws, no matter how flagrant the alleged violation, is not relevant and need not be considered by the Federal Power Commission in deciding whether the public interest justifies approval of the sale of securities which will have the effect of releasing funds for such purposes.

The Court of Appeals called the Commission's decision "tunnel vision." 454 F.2d at 951. We agree.

III. THIS COURT HAS HELD PRACTICES ANALOGOUS TO THE PRACTICES COMPLAINED OF BY THE CITIES TO BE THE BASIS FOR A VALID CAUSE OF ACTION AS A VIOLATION OF THE ANTITRUST LAWS

The relevancy of the Cities' charges of antitrust violations, ignored by the Federal Power Commission, is highlighted by this Court's recent decision in *California Motor Transport Company* v. *Trucking Unlimited*, 404 U.S. 508 (1972), affirming the Ninth Circuit Court of Appeals, 432 F.2d 755 (1970).[4] The Court of Appeals had reversed the District Court's dismissal for failure to state a cause of action. In affirming the

[4] The Department of Justice itself has recognized the relevancy of the Cities' charges of antitrust violations in a letter from the Attorney General of the United States, dated Aug. 18, 1972, published in 37 Fed. Reg. 17775 (1972). The Department, in the letter, indicated that it is investigating "basically the same antitrust allegations" against Louisiana Power & Light as were set forth in the opinion below in the present case.

Court of Appeals, this Court held that the practices alleged constituted a cause of action as a violation of the antitrust laws.

The alleged predatory practices in *California Motor Transport,* closely analogous to the practices alleged in the case before this Court, were: first, obstruction of competitors' applications for assistance and approval of federal agencies; second, widely publicized blanket opposition, regardless of the merits, to efforts of competitors to improve their business positions; third, harassment through frivolous litigation in courts and agencies.

The obstruction in *California Motor Transport* was the 1961 opposition of the original defendant trucking companies to the filing of applications for certificates of public convenience and necessity by their competitors with the Interstate Commerce Commission and the California Public Utilities Commission. 432 F.2d at 762. The obstruction in the instant case is Gulf States Utilities' actions from September 1964, to January 1969, in denying the Cities and their partner, Louisiana Electric Cooperative, Inc., the use of a $56.5 million 1964 loan from the Rural Electrification Administration. 454 F.2d at 945.

The publicized opposition in *California Motor Transport* was the trucking companies jointly funded publicity campaign to intimidate their competitors and prevent further applications for certificates of public convenience and necessity. 432 F.2d at 762. The publicized opposition in the instant case was the mounting of a massive public relations drive and substantial lobbying effort against Louisiana Electric Cooperative, Inc., the Cities' partner in the interconnection and pooling agreement. 454 F.2d at 945.

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In both *California Motor Transport* and the present case, the wrongdoers engaged in frivolous, repetitive and unsuccessful litigation. In both instances, the challenged practices were of sufficient anticompetitive quality to constitute a legal cause of action under the antitrust laws.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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September 21, 1972

INDEX

	Page
INTEREST OF THE AMICUS CURIAE	2
QUESTION PRESENTED	3
STATUTES INVOLVED	3
SUMMARY OF ARGUMENT	3
ARGUMENT	5
I. The allegations that the proceeds will be used for an unlawful object are substantial	5
II. FPC had a duty to consider Cities' allegations in a Sec. 204 proceeding	8
III. FPC authorization to issue securities should be appropriately conditioned for the protection of Cities and Dow	18
CONCLUSION	18
APPENDIX	

CITATIONS

CASES:

Admiral-Merchants Motor Freight, Inc. v. *United States*, 321 F.Supp. 353 (D. Colo.), *aff'd per curiam* 404 U.S. 802, *reh. den.* 404 U.S. 987 17

Atlantic Refining Company v. *Public Service Commission of N. Y.*, 360 U.S. 378 17

Burke v. *Ford*, 389 U.S. 320 7

Carnation Co. v. *Pacific Westbound Conf.*, 383 U.S. 213 10

Cities of Statesville, et al. v. *Atomic Energy Commission*, 441 F.2d 962 (D.C. Cir.) 10, 11

Citizens of Allegan County, Inc. v. *Federal Power Com'n*, 414 F.2d 1125 (D.C. Cir.) 8

City of Paris v. *Ky. Utilities Co.*, 41 F.P.C. 45 16

Page

Denver & Rio Grande Western R. Co. v. *United States*, 387 U.S. 485 ..... 8, 13
Federal Power Commission v. *Hunt*, 376 U.S. 515 17
Gainsville Utilities Dept. v. *Florida Power Corp.*, 402 U.S. 515 6
Paramount Famous Lasky Corp. v. *United States*, 282 U.S. 30 3
Russell v. *Farley*, 105 U.S. 433 17
Texaco, Inc. v. *Federal Power Commission*, 290 F.2d 149 (C.A. 5) 17
United Gas Improvement Co. v. *Callery Properties, Inc.*, 382 U.S. 223 17
United States v. *Chicago, M., St. P. & P. R. Co.*, 282 U.S. 311 17

STATUTES:

Atomic Energy Act, 1954:
Sec. 103 11
Sec. 104 11

Federal Power Act:

Sec. 10(h), 16 U.S.C. § 803(h) 3, 12
Sec. 204, 16 U.S.C. § 824c ..3, 4, 7, 8, 9, 11, 12, 14, 15, 18
Sec. 204(a), 16 U.S.C. § 824c(a) 3
Sec. 204(b), 16 U.S.C. § 824c(b) 3, 12

Interstate Commerce Act:

Sec. 20a, 49 U.S.C. § 20a 13

MISCELLANEOUS:

Electric World Directory of Electric Utilities (1972-73 Ed.) 5

Hearings on H.R. 5423, Committee on Interstate and Foreign Commerce, 74th Cong., 1st Sess. ...11, App. 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1178

GULF STATES UTILITIES COMPANY, *Petitioner*,

v.

FEDERAL POWER COMMISSION,
CITY OF LAFAYETTE, LOUISIANA,
CITY OF PLAQUEMINE, LOUISIANA, *Respondents*.

On Writ of Certiorari to The United States Court Of Appeals for the District of Columbia Circuit

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BRIEF FOR THE DOW CHEMICAL COMPANY AS AMICUS CURIAE

This brief is submitted by The Dow Chemical Company (Dow) in support of the position of the respondents City of Lafayette, Louisiana and City of Plaquemine, Louisiana (Cities). It is accompanied by written consents of all parties.

INTEREST OF THE AMICUS CURIAE

To supply the electric power requirements of its chemical plant at Plaquemine, Louisiana, Dow owns and operates its own generating units. Like any company with a single source of generation, Dow requires a connection with a neighboring utility with arrangements for backup power and exchange of economy energy in order to insure reliability and maximum economy. Until recently, Dow had a connection with Gulf States Utilities Company (Gulf States) but severed the relationship because Gulf States was unwilling to supply the type of service required.

Dow is a party to an Interconnection and Pooling Agreement with Cities and the Louisiana Electric Cooperative (LEC) (J.A. pp. 82-106) which, once effective, will provide backup for each system and will permit economy energy exchanges among the pool members. The gravamen of the protest by Cities against approval of Gulf States' financing was that the funds would be used in furtherance of a conspiracy (successful up to now) by Gulf States and other investor-owned utilities to prevent the pooling agreement from becoming effective by (1) preventing LEC from building the transmission lines contemplated thereby and (2) refusing to transmit power for the parties thereto over their own lines.

Subsequent to the decision of the court below, Gulf States sought, in FPC Docket No. E-7567, authorization to issue $35,000,000 principal amount of first mortgage bonds and 2,000,000 additional shares of common stock. Cities filed a Protest and Petition to Intervene in that proceeding also. By order dated November 4, 1971, FPC determined that that Protest and Petition for Intervention should be accepted and

handled as a complaint and instituted an investigation to which it assigned FPC Docket No. 7676. Dow has intervened in and is now a party to the latter proceeding.

Dow's interest is similar to that of Cities but with one important difference. Dow is not a competitor of Gulf States but a consumer and is therefore a member of the public whose protection is the ultimate objective of the antitrust laws. *Paramount Famous Lasky Corp.* v. *United States,* 282 U.S. 30.

QUESTION PRESENTED

Whether, in considering an application for authorization to issue securities under Section 204 of the Federal Power Act, FPC can refuse to consider a substantial contention, properly raised, that the proceeds of the sale of the securities will be used for the unlawful purpose of suppressing competition in violation of the antitrust laws.

STATUTES INVOLVED

Sections 10(h) and 204(a) and (b) of the Federal Power Act (16 U.S.C. §§ 803(h), 824c(a)(b)) are included in the Appendix to this brief, *infra* App. 1-2.

SUMMARY OF ARGUMENT

Section 204 of the Federal Power Act requires FPC to determine whether an issue of securities is in the public interest and also whether the proceeds will be used "for some lawful object" and to impose appropriate conditions to insure that this is done. Nothing in the legislative history detracts from the plain meaning of this language.

Cities have presented a substantial contention that part of the proceeds of a securities issue will be used for an unlawful object—the furtherance of a conspiracy to prevent Cities, Dow and LEC from making effective a pooling arrangement which would permit the mutual exchange of backup and economy power—and have asked that approval be appropriately conditioned to prevent the use of the proceeds for that purpose.

The prevention of anti-competitive effects must be considered by an agency as part of the public interest unless Congress has clearly indicated that "public interest" must be more narrowly construed in a specific situation. While the legislative history of Sec. 204 of the Federal Power Act may indicate that a major concern of Congress was with the financial stability of utilities, there is nothing in the legislative history indicating that Congress intended that FPC consider only this question and ignore every other facet of public interest.

The decision of the court below was a reasonable accommodation between the need of the issuer for prompt consideration and the need of the party injured for relief from anti-competitive action. The court below gave FPC all the flexibility it required, permitting it even to approve the issue without a hearing so long as it made arrangements to take the problems into account in the disposition of another application within a reasonable time.

There is no merit to the argument that other avenues of relief are open to aggrieved parties. Neither a suit for treble damages nor other available remedies is an adequate substitute. What Dow, Cities and LEC need is access to the transmission systems of the investor-owned utilities for the transfer of power be-

tween themselves as a substitute, however inadequate, for the use of the transmission line which LEC proposed to build and was prevented from building by the activities of Gulf States and its co-conspirators. FPC has ample authority to require that such access be provided as a condition of authorization to issue the securities.

ARGUMENT

I.

The Allegations That the Proceeds Will Be Used for an Unlawful Object Are Substantial

It should be emphasized at the outset that there is nothing insubstantial about the contention of Cities (with which Dow is in complete agreement) that part of the proceeds of Gulf States' issuance of securities will be used for an unlawful object.

The Louisiana electric power industry consists of 5 investor-owned utilities, 29 municipalities and 14 cooperatives.[1] Some of the municipalities, including Cities, generate all or part of their own power requirements. LEC is a generation and transmission cooperative created to supply the power requirements of its member cooperatives. The transmission grid is owned by the investor-owned utilities.

By reason of the increase in the size of generating units, it has become impossible for a municipality, or other small utility, to furnish reliable and economical power to its customers by operating as an isolated system, relying entirely on its own generation. It must, of necessity, have access to other sources of power, at

[1] *Electrical World Directory of Electric Utilities* (1972-73 Ed.), p. 307.

least for the purpose of obtaining backup power.[2] As the owner of an isolated generating plant, Dow is in a position similar to that of a small utility.

The ownership of the transmission grid by the investor-owned utilities drastically reduces the sources of power available to other power systems. Any other power system is a captive customer of the nearest investor-owned utility unless it builds a transmission line or can arrange with the investor-owned utilities to transmit power for it. Thus, Lafayette is interconnected only with Central Louisiana Electric Company, Inc. (CLECO), and Plaquemine is interconnected only with Louisiana Power and Light Company (LP&L). Until recently, Dow was connected to Gulf States but it terminated the interconnection agreement because Gulf States used, and abused, its monopoly position to impose an economic penalty on Dow greater than that incurred by isolation of its generating units.

In order to provide power to its members, LEC began construction of a generating plant at New Roads, Louisiana. It also proposed to build a transmission line to permit transmission to its members and exchange of power with Cities and Dow in order to obtain the benefits of coordinated operation for LEC, Cities and Dow pursuant to the pooling agreement.

Dow supports fully the contentions of Cities that Gulf States and other investor-owned utilities undertook to destroy LEC by concerted action, using such devices as baseless lawsuits, public relations drives, lobbying and efforts to influence administrative officials. These efforts delayed construction of LEC's

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[2] See *Gainesville Utilities Dept.* v. *Florida Power Corp.*, 402 U.S. 515.

generating plant and culminated in action by the REA Administrator withholding funds committed to LEC for construction of the transmission line but with the understanding that the investor-owned utilities would transmit power for the members of the pool.

Long drawn out negotiations ensued but the investor-owned companies have not agreed to transmit power for the pool members. Ultimately, in order to dispose of the power at its plant, LEC entered into an "interim agreement" with Gulf States, CLECO and LP&L to turn over to them control of the generation at the plant, all of which will be delivered to the companies' system. In return, the companies agreed to transmit power to some of LEC's members and constructed additional transmission facilities for that purpose.[3]

The foregoing agreement is the latest step in the concerted effort of Gulf States and its co-conspirators to maintain a monopoly in bulk power supply and transmission and to keep the pool members in a captive state. It is believed that some of the proceeds of the issuance of the securities by Gulf States will be used to carry out this agreement.[4]

The furtherance of a conspiracy to monopolize and to divide markets is not a lawful object. *Burke* v. *Ford,* 389 U.S. 320. As discussed more fully *infra,* pp. 8-16, Section 204 of the Federal Power Act permits ap-

[3] This agreement was filed with FPC as a rate schedule (FPC Docket No. E-7696). By order dated August 7, 1972, it was accepted "pending final determination of the issues set for hearing in Docket No. E-7676."

[4] That the allegations of Cities are not insubstantial is indicated by the fact that the Department of Justice has served Civil Investigative Demands upon Gulf States and other Louisiana investor-owned utilities.

proval only of securities issued for a "lawful object" and authorizes FPC to condition the use of the proceeds. It is reasonable for Cities to ask, and we think FPC has a duty to require, that use of the proceeds of the issue of securities for carrying out the agreement with LEC be conditioned upon cessation of the conspiracy and an undertaking by Gulf States to provide the pool members with a reasonable alternative to the benefits they had provided for themselves in the pooling agreement.[5] This could be accomplished by a requirement that energy be transmitted over the companies' system for the pool members at a reasonable and non-discriminatory rate.[6]

II.

FPC Had a Duty To Consider Cities' Allegations in a Sec. 204 Proceeding

What was the duty of FPC when faced in a Sec. 204 proceeding with (1) substantial allegations that the proceeds of the securities would not be used for a lawful object but in furtherance of an unlawful conspiracy, and (2) a request that any approval of the issue of the securities be conditioned by a requirement that Gulf States take action to eliminate, or at least reduce

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[5] The fear expressed by FPC that affirmance of the decision of the court below would require FPC to consider "attenuated antitrust allegations" under Sec. 204 is groundless. We do not contend, and the court below did not hold, that FPC needs to consider claims which are not substantial. The type of claim which FPC purports to fear would not require a hearing but could be disposed of summarily. *Citizens for Allegan County, Inc.* v. *Federal Power Com'n*, 414 F.2d 1125 (D.C. Cir.); *Denver & Rio Grande Western R. Co.* v. *United States*, 387 U.S. 485, 498.

[6] It should be noted that Cities have not asked (and Dow is not asking) that FPC enforce the antitrust laws "as such", as FPC and Petitioner seem to suggest. (FPC Br., p. 19, Pet. Br., p. 29)

for the future, the injury to Cities, LEC and Dow resulting from the alleged unlawful actions?

Section 204 of the Federal Power Act directs FPC to authorize an issue of securities only if it finds:

> that such issue . . . (a) is for some lawful object, . . . compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the applicant of service as a public utility . . . and (b) is reasonably necessary or appropriate for such purposes.

The Act further provides that the Commission may grant an application:

> . . . in whole or in part, and with such modifications and *upon such terms and conditions as it may find necessary or appropriate,* and may . . . by . . . supplemental order modify the provisions of any previous order *as to* the particular purposes, uses and extent to which, or *the conditions under which,* any security so theretofore authorized or *the proceeds thereof may be applied* . . . (emphasis supplied)

On its face, the foregoing provisions appear to require clearly that FPC consider substantial allegations that the funds may be used for a purpose which is not a "lawful object" and, if the allegations are sustained, that it impose appropriate conditions requiring that the proceeds be applied only to lawful objects.

The briefs of FPC and Petitioner focus on the "public interest" language and ignore the requirement that the proceeds be used for a "lawful object." But if the focus is on "public interest" the answer is the same. Their arguments proceed from a basic fallacy—that the term "public interest" should be narrowly con-

strued to exclude anti-competitive effects unless Congress has clearly demonstrated a contrary intent. The law as heretofore enunciated by this Court and lower federal courts is directly to the contrary. The existing law is summarized in *Cities of Statesville, et al.* v. *Atomic Energy Commission,* 441 F.2d 962, 987 (D.C. Cir.) (Concurring Opinion):

> It is a fair synthesis of the cases that a statute providing for licensing *or other regulation* is presumed to permit consideration of antitrust principles . . . unless a contrary intent appears expressly or by necessary implication. (emphasis supplied)

In a variety of cases involving several federal regulatory agencies, this Court and lower federal courts have repeatedly held that the principles of the antitrust laws are an essential part of the public interest and that federal agencies must consider anti-competitive effects in determining whether a proposed action is consistent with the public interest. Many of the cases are collected in the opinion of the court below (454 F.2d 941, 948, Fn. 9) and in *Cities of Statesville* v. *Atomic Energy Commission, supra* (p. 986).[7]

We are not suggesting that the term "public interest" necessarily requires a consideration of antitrust implications in all circumstances. Congress has sometimes made clear that antitrust effects are not to be considered in specific situations as, for example, in

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[7] *Cf. Carnation Co.* v. *Pacific Westbound Conf.,* 383 U.S. 213, 218, in which this Court noted:

> We have long recognized that the antitrust laws represent a fundamental national economic policy and have therefore concluded that we cannot lightly assume that the enactment of a special regulatory scheme for particular aspects of an industry was intended to render the more general provisions of the antitrust laws wholly inapplicable to that industry.

the Atomic Energy Act where Congress, by expressly requiring antitrust review of applications for commercial licenses under Sec. 103 of the Act, made clear that it did not intend to require antitrust review in connection with research and development licenses under Sec. 104 of the Act (42 U.S.C. §§ 2133-2135) *Cities of Statesville* v. *Atomic Energy Commission, supra.*

There is nothing in the Federal Power Act or in its legislative history which indicates that Congress intended that FPC, in administering Sec. 204, ignore anti-competitive effects in determining where the public interest lies. Both FPC and Petitioner discuss the legislative history but the most that can be argued in support of their position is that the legislative history is neutral.[8]

There is, however, support in the legislative history for the proposition that Congress affirmatively demonstrated its intention that FPC consider anti-competi-

[8] In an effort to find some support for the theory that Congress affirmatively indicated an intent that FPC not consider anti-competitive effects, Petitioner argues on the basis of an excerpt from the testimony of FPC's Solicitor (Pet. Br., p. 16), that Congress did not intend to preserve competition in the electric power industry. There are at least three things wrong with this argument. 1. Assuming, *arguendo,* that Congress did not intend to encourage utilities to compete for retail customers by raiding each other's territory, it does not follow that it intended to sanction a conspiracy to monopolize and divide the markets for bulk power supply and transmission. 2. The argument proves too much. It would require FPC to ignore anti-competitive effects in administering *all* provisions of the Act. FPC concedes that it must consider such factors in administering all of the Act's other provisions (FPC Br., pp. 13-14). 3. The quotation is taken out of context. The entire colloquy is included in the Appendix to this brief. It shows only that the witness was floundering in trying to explain what was intended by Sec. 202(a) of the House bill (H.R. 5423).

tive effects in administering all sections of the Act. Sec. 10(h), which was enacted as part of the original Act, provides:

> That combinations, agreements, arrangements, or understandings, express or implied, to limit the output of electrical energy, to restrain trade, or to fix, maintain, or increase prices for electrical energy or service are hereby prohibited.

As part of the 1935 Amendments which added Part II to the Federal Power Act, Congress amended and reenacted Section 10 but with no changes in subsection (h). Congress thus considered and reaffirmed the policy against anti-competitive action. Had Congress intended to except Sec. 204 from this policy, one would have expected it to do so expressly.

It may be true that Congress was focusing attention primarily on preventing the issuance of securities which might impair a company's financial integrity, but that does not mean that Congress intended that all other public interest considerations should be ignored. In the absence of a showing of an affirmative Congressional intent that public interest, as used in Sec. 204, be construed to exclude anti-competitive effects, Petitioner and FPC are driven to arguing that FPC can consider *no* aspect of public interest except whether "the issuance of securities . . . might impair the company's financial integrity or its ability to perform its public utility responsibilities" (FPC Br., p. 21, Pet. Br., p. 10).[9] Precisely the same argument was made with ref-

[9] Implicit in this argument is the contention that FPC must blind itself to the uses which Gulf States proposed to make of the proceeds. How this can be reconciled with the authorization to the Commission in Section 204(b) to specify the purposes for which and the conditions under which the proceeds of the securities may be applied is never explained.

erence to § 20a of the Interstate Commerce Act in *Denver & Rio Grande Western R. Co.* v. *United States,* 387 U.S. 485. In response to that argument, this Court stated:

> We do not agree that Congress limited ICC consideration under § 20a to an inquiry into fiscal manipulation. Even if Congress' primary concern was to prevent such manipulation, the broad terms "public interest" and "lawful object" negate the existence of a mandate to the ICC to close its eyes to facts indicating that the transaction may exceed limitations imposed by other relevant laws. Common sense and sound administrative policy point to the conclusion that such broad statutory standards require at least some degree of consideration of control and anti-competitive consequences when suggested by the circumstances surrounding a particular transaction. Both the ICC and this Court have read terms such as "public interest" broadly, to require consideration of all important consequences including anti-competitive effects. (p. 492)

If attention is focused on the requirement that the proceeds be used for a lawful object rather than on the public interest requirement, the situation becomes even clearer. By no stretch of the imagination can it be argued that a conspiracy among investor-owned utilities to monopolize the market for bulk power supply and to divide the market so as to make each municipality the captive of a particular company is a lawful object, *supra*, p. .

FPC argues than antitrust violations can be considered by it in proceedings under every other section of the Act and draws the conclusion that the availability of a forum under other sections of the Act makes it unnecessary for an aggrieved party to intervene in a

Sec. 204 proceeding. As explained, *infra* pp. 15-16, this is not so, but, in any event, the conclusion to be drawn from the above premise would seem to be that Congress intended FPC to be alert to antitrust problems in administering *all* the sections of the Act. It is scarcely logical to assume that Congress, without expressly saying so, would have exempted a single section from the general mandate to consider anti-competitive effects in administering the Act.

Both FPC and Petitioner express grave concern about the delay involved in considering antitrust allegations in a Sec. 204 case. The court below recognized this problem and reached a reasonable accommodation between the needs of the issuer for prompt consideration and the need of the party injured for prompt relief from anti-competitive action. The court stated:

> We are aware too, of the pertinence of the comment of FPC's counsel, that security issues to provide funds for a utility's construction must be decided in a time frame much more limited than that often contemplated for antitrust litigation. But the doctrine of public interest consideration does not contemplate that an agency will be engaged in a determination of antitrust issues as such.
>
> In the context of a particular matter, it may become evident that the agency may approve forthwith a large portion of the application, and the use of the funds contemplated thereby, while reserving decision on the difficult issue. Indeed even an entire application may be approved if the agency stands ready to proceed with hearing and consideration of the anticompetitive issues, and to take the problems into account in the disposition of another application projected for presentation to the agency within a reasonable time. (p. 953)

FPC has more than taken advantage of the leeway thus granted to it. Instead of resolving Cities' contentions in the pending or in a subsequent Sec. 204 proceeding, it decided to treat Cities' intervention in a subsequent proceeding as a complaint and assigned it a separate docket number.[10] The complaint docket is now proceeding at a leisurely pace and all proceedings therein have been stayed by FPC over our protest pending the determination of this case.[11] We think FPC was in error both in refusing to consider Cities' allegations in a Sec. 204 proceeding and in staying the complaint proceeding pending final action in this case. A major advantage of considering anti-competitive allegations in a finance case is that the pressures of time require that the issues be disposed of promptly. This Court is fully aware of the opportunities for delay presented in the ordinary proceeding. Relief in the existing complaint proceeding is a long way down the road. Had FPC undertaken to resolve the anti-competitive issues in a Sec. 204 proceeding, we are satisfied that they would have been resolved long before this.

The argument is also made that the aggrieved parties do not need relief under Sec. 204 because other avenues of relief are available to them, including action by the Department of Justice and treble damage suits. The short answer is that no other remedy presents an

[10] Protests by Cities and Dow against still a third application for authority to issue securities (FPC Docket No. E-7682) and in FPC Docket No. E-7696 (*supra*, p. 7) were also treated as complaints and consolidated with FPC Docket No. E-7676.

[11] Following the initiation of the proceeding in Docket No. E-7676, extensive discovery procedures were undertaken, involving considerable time and expense. The issuance of the stay order interrupted this essential procedure, and will cause even greater delay and expense once the proceeding is reactivated.

acceptable alternative. Dow has no interest in whether Gulf States is criminally prosecuted. Dow's interest is in manufacturing chemicals at a reasonable cost. It generates its own power to serve its basic load but it needs to obtain supplementary power and seeks to obtain it at rates and under terms and conditions dictated by the forces of competition between alternative sources of supply—Gulf States, other investor-owned utilities and the other members of the pool. A treble damage suit after the fact would be a poor substitute for an order from FPC conditioning approval of the issuance of securities upon the transmission of electric power for Dow on reasonable and nondiscriminatory terms. An independent proceeding before the Commission, as in FPC Docket No. E-7676, is an alternative, it is true, but not a satisfactory one. A proceeding of this kind provides ample opportunities for delay, as indicated by the tortoise-like progress of the present proceeding. In such a proceeding, we face, moreover, the position adopted by FPC in *City of Paris* v. *Ky. Utilities Co.*, 41 F.P.C. 45 that it lacks authority to order a utility to wheel electric power.[12] Assuming that FPC adheres to this position, Dow will be faced with the necessity of going to court before it can obtain effective relief. In the meantime, the operations at Dow's Plaquemine plant will continue to suffer.

III.

FPC Authorization To Issue Securities Should Be Appropriately Conditioned for the Protection of Cities and Dow

Dow recognizes that the Commission's authority to impose conditions on the use of proceeds of securities

[12] Compare FPC's statement quoted at p. 31 of Petitioner's brief with the assurances in the FPC brief (pp. 13-15) that Cities can obtain relief in the complaint proceeding if they sustain their allegations.

is not unlimited. *United States* v. *Chicago, M., St. P. & R. Co.,* 282 U.S. 311 (see, Pet. Br., p. 22). It is not true, nevertheless, that conditions which would provide relief to Dow and Cities would be beyond FPC's authority. We believe that FPC has authority to grant all the relief necessary in a complaint proceeding but, even if it did not, it would not follow that the relief could not be granted by conditioning the approval of a security issue. Any conditions which FPC might impose would need to be appropriate but the power to impose conditions is broader than the statutory authority to grant relief in a complaint proceeding. *Atlantic Refining Company* v. *Public Service Commission of N.Y.,* 360 U.S. 378; *Federal Power Commission* v. *Hunt,* 376 U.S. 515; *United Gas Improvement Co.* v. *Callery Properties, Inc.,* 382 U.S. 223; *Admiral-Merchants Motor Freight, Inc.* v. *United States,* 321 F. Supp. 353 (D. Colo.), *aff'd per curiam* 404 U.S. 802, *reh. den.* 404 U.S. 987; *Texaco, Inc.* v. *Federal Power Commission,* 290 F.2d 149 (C.A. 5). *Cf. Russell* v. *Farley,* 105 U.S 433.

In *Texaco, Inc.,* the Court of Appeals for the Fifth Circuit stated the rule as follows:

> . . . the power of the Commission to condition a certificate is co-extensive with its power to reject or deny a certificate, . . . [because] . . . the power to reject an application for certificate completely is harsher than the power to grant it on any reasonable condition. (p. 156)

So also the power of FPC to refuse to authorize an issue of securities where the proceeds are to be used for an unlawful object includes the power to grant the authorization on conditions reasonably adapted to cure the evil which otherwise would require denial of the authorization. The precise condition will need to be

determined by FPC after hearing but a condition requiring Gulf States to transmit power for the members of the pool on a reasonable and non-discriminatory basis would seem to be both necessary and appropriate.

CONCLUSION

Section 204 of the Act requires the Commission to determine whether the proceeds of a security issue will be used for a "lawful object" and to impose appropriate conditions which will insure that they be used for that purpose. Faced with a substantial contention that the proceeds of an issue of securities would be used for the unlawful purpose of suppressing competition in violation of the antitrust laws, the FPC had a duty to consider such allegations, and, if they were found to be true, to impose conditions appropriate to insure that the proceeds would not be used for such unlawful purpose.

The decision of the court below should be affirmed and this Court should make clear that Cities' allegations must be considered by FPC in a Sec. 204 proceeding and relief must be granted in that proceeding if the allegations are sustained.

Respectfully submitted,

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APPENDIX

APPENDIX

Federal Power Act

SEC. 10(h) That combinations, agreements, arrangements, or understandings, express or implied, to limit the output of electrical energy, to restrain trade, or to fix, maintain, or increase prices for electrical energy or service are hereby prohibited.

SEC. 204. (a) No public utility shall issue any security, or assume any obligation or liability as guarantor, indorser, surety, or otherwise in respect of any security of another person, unless and until, and then only to the extent that, upon application by the public utility, the Commission by order authorizes such issue or assumption of liability. The Commission shall make such order only if it finds that such issue or assumption (a) is for some lawful object, within the corporate purposes of the applicant and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the applicant of service as a public utility and which will not impair its ability to perform that service, and (b) is reasonably necessary or appropriate for such purposes. The provisions of this section shall be effective six months after this Part takes effect.

(b) The Commission, after opportunity for hearing, may grant any application under this section in whole or in part, and with such modifications and upon such terms and conditions as it may find necessary or appropriate, and may from time to time, after opportunity for hearing and for good cause shown, make such supplemental orders in the premises as it may find necessary or appropriate, and may by any such supplemental order modify the provisions of any previous order as to the particular purposes, uses, and extent to which, or the conditions under which, any security so theretofore authorized or the proceeds thereof

may be applied, subject always to the requirements of subsection (a) of this section.

Excerpt From Hearings on H.R. 5423, Committee on Interstate and Foreign Commerce, 74th Cong., 1st Sess., pp. 554-555

Mr. Pettengill. Mr. DeVane, I want to compliment you upon the patience with which you have stood here for almost 4 hours and answered every question we have asked, and we are asking them only for the purpose of obtaining information. We do not know as much about this as you do. I would like to ask you this question: Here is a market, let us say (indicating) in my home city; here is a generating plant, and we will say that entire market is being supplied by this generating plant, and it is capable of furnishing sufficient power.

Here is another generating plant owned by a competitor of this one (indicating and illustrating), and does not have access to this market. It has no transmission lines. Now, do you agree that by order of your Commission you may require this company (indicating) to carry that generating plant's (indicating) energy to that market in competition with the original company?

Mr. DeVane. No, sir; if I understand your question, the answer to that is "no."

Mr. Pettengill. Well, section 202(a), makes it the duty of every public utility to transmit energy for any person, and so forth, and to furnish and maintain such services and facilities, and so forth. Now, how do you distinguish the language of the bill from the illustration that I have drawn?

Mr. DeVane. You are talking about the power now; you are talking about a power to compel transmission?

Mr. Pettengill. Yes.

Mr. DeVane. Power to compel carriers to transmit energy?

Mr. Pettengill. Yes.

Mr. DeVane. That power is complete insofar as it may require transmission in certain cases. There is nothing in this bill, however, that provides for competition. It is entirely silent in that respect and differs from the language of the Interstate Commerce Commission, if that is what you may have in mind.

There, as you recall, Congress provided that competition should be preserved and if Congress should desire to establish competition in this industry it should be written in any legislation adopted by Congress. There is nothing in this bill that permits one utility to enter another utility's field and in doing so to require the other utility to transport its power for the purpose. There is nothing like that in this bill.

Mr. Pettengill. And, if the language is capable of that interpretation, you are willing to have it clarified or excluded?

Mr. DeVane. If that is necessary for the purpose of clarification, yes; but when I make these concessions, as we move along here, I want it clearly understood upon the record, that I think this bill is not ambiguous, and I think the bill accomplishes the purposes that I have stated.

Mr. Pettengill. Well, what sort of situation would the language of 202(a) apply?

Mr. DeVane. Two hundred and two?

Mr. Pettengill. Which requires every public utility to transmit energy for any persons.

Now, on the face of the bill, does not that require this line [indicating] the generator furnishing this market, to

carry its competitor's energy into that market, if they can get your consent for it?

Mr. DeVane. We will take a company that lies between one producing energy and another needing energy, and we will assume that the middle company cannot furnish the needed energy to its neighbor but has facilities that are available for transmitting the energy from the producing company to the one in need. The Commission could require the use of those facilities in order to meet that situation.

Mr. Pettengill. But not to take the company that owns the line; not to take its market away from it?

Mr. DeVane. No, not to take the market away from it; no, sir.

Mr. Pettengill. Well, now, suppose the second generating plant does not have plant facilities, power lines, to the market, and comes to you and says, "We will furnish the energy to this market much cheaper than the company in business at the present time." What are you going to do with that? Are you going to deny these people here [indicating] the cheaper energy which generating plant no. 2 offers to furnish them?

Mr. DeVane. You have now—

Mr. Pettengill. We have two generating plants to furnish this market. One is the existing plant whose distribution lines are there and has sufficient power to furnish the market.

This generating plant [indicating] over here has no transmission lines to that market, but it says, "If you will compel this company to carry our energy there, we will furnish that market much cheaper than this company is doing it."

Now, what are you going to do in that situation? Are you going to say to these people. "No. I am sorry, but you have got to pay the higher price which these people charge?"

Mr. DeVane. I do not know the answer to that question right now. That is as frank as I can be. My answer is that the law will be administered in the public interest and what is right in the circumstances will be done.

INDEX

	Page
OPINION BELOW	1
JURISDICTION	2
STATUTE INVOLVED	2
QUESTIONS PRESENTED	2
STATEMENT OF THE CASE	3
A. Introduction	3
B. The Factual Background	4
C. The Application	8
D. The Court of Appeals' Decision	13
SUMMARY OF ARGUMENT	14
ARGUMENT	17
I. The Relation of the Antitrust Laws to the Federal Power Act	17
A. The Electric Power Industry and Competition	17
B. Competition as Seen by Congress in the Electric Industry	18
C. Competition in the Electric Industry as Seen by the FPC and the Courts	24
D. The Decisions of this Court Under the Natural Gas Act	25

Page

II. The FPC Is Required to Approve the Purpose for Which the Proceeds of a Financing Will Be Spent 27

III. The FPC Cannot Approve a Financing for Purpose Inconsistent with the Antitrust Laws Without Condition 37

IV. There Is No Other Justification For Ignoring The Statutory Requirement 40

CONCLUSION 48

APPENDIX 49

CITATIONS

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Admiral-Merchants Motor Freight v. United States, 321 F.Supp. 353 (D. Colo., 1971) *affirmed* 404 U.S. 802, rehearing denied 404 U.S. 987 46

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Page

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Page

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Page

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Page

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Section 105, 42 USC 2135 23
Section 105(a), 42 USC 2135(a) 23
Section 105(c), 42 USC 2135 (c) 23
1970 Amendments 23
Clayton Act, 15 USC 12, *et seq.* 17, 19
18 CFR 1.19 31
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49 USC 1384 22
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Section 10(h), 16 USC 803(h) 19, 20
Section 202, 16 USC 824a 38, 40, 45
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Section 204, 16 USC 824c . . . . . *passim*
Section 204(a), 16 USC 824c(a) 27, 31, 32, 33
Section 204(b), 16 USC 824c(b) 28,30
Section 204(c), 16 USC 824c(c) 29
Section 204(f), 16 USC 824c(f) 27, 35
Section 205, 16 USC 824d 38, 45
Section 206, 16 USC 824e 38
Section 207, 16 USC 824f 38
Section 305, 16 USC 825d 38
Section 306, 16 USC 825e 38
Section 307, 16 USC 825f 38
Section 309, 16 USC 825k 46
Section 313, 16 USC 825l 10, 11
Section 313(b), 16 USC 825l(b) 2
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Section 5(11), 49 USC 5(11) 22
Section 5A(9), 49 USC 5b(9) 22

Page

Statutes & Regulations Continued:

Section 20a, 49 USC 20a . . . . . *passim*
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Regulations Under The Federal Power Act
Section 34.1a, 18 CFR 34.1a 34
Section 34.2(q), 18 CFR 34.2q 31
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Section 45, 18 CFR 45 35
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8683 20
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34318 23
34309 24
39619 24
39620 24
39621 24
39948 24
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Page

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1964 National Power Survey, FPC 18
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No. 71-1178

IN THE

Supreme Court of the United States

October Term 1972

GULF STATES UTILITIES COMPANY,
Petitioner,

v.

FEDERAL POWER COMMISSION
CITY OF LAFAYETTE, LOUISIANA
CITY OF PLAQUEMINE, LOUISIANA
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT CITIES OF LAFAYETTE AND PLAQUEMINE, LOUISIANA

OPINION BELOW

The opinion of the Court of Appeals (Pet. App. 1a-29a)[1] is reported at 454 F.2d 941. The orders of the Federal Power Commission here at issue are reported at 44 FPC 1524 (J.A. 181) and, on rehearing, at 45 FPC 139 (J.A. 200)[2].

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[1] "Pet. App. " references are to the Appendix to the petition for certiorari filed by Gulf States Utilities Company in this proceeding. "J.A. " references are to the oversize Appendix filed in this proceeding by leave of this Court.

[2] The supplemental order of the FPC issued December 9, 1970, and reported at 44 FPC 1555 (J.A. 186) is also technically before this Court.

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia Circuit was entered on October 12, 1971. On October 22, 1971, Gulf States Utilities Company moved to extend the time within which to file a petition for rehearing to November 25, 1971. On November 5, 1971, an order was entered granting that motion. On November 24, 1971, a petition for rehearing was filed, which petition was denied *per curiam* on December 15, 1971 (Pet. App. 31a). A petition for a writ of certiorari was filed on March 13, 1972, and on May 30, 1972, this Court granted that petition.

The jurisdiction of this Court rests upon 28 USC 1254 (1) and Section 313(b) of the Federal Power Act, 16 USC 825 *l*(b).

STATUTE INVOLVED

Section 204 of the Federal Power Act, 16 USC 824c, is set out in the appendix, *infra.*, pages 49-51 .

QUESTIONS PRESENTED

The Federal Power Commission must, under Section 204 of the Federal Power Act, authorize the issuance of a security proposed to be issued by a public utility before such issuance can take place. The Commission is empowered to issue such authorization only if it finds that the issue (a) is for some lawful object, within the corporate purposes of the applicant and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the applicant of service as a public utility and which will not impair its ability to perform that service, and (b) is reasonably necessary or appropriate for such purposes. The questions here are:

1. Whether the FPC, in approving a proposed issuance by a utility of long term bonds without the hearing sought by protestants, may reject as irrelevant the claim by protestants, supported by substantial *prima facie* evidence, that the utility

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had been utilizing available funds, and would utilize the funds made available by the financing, unlawfully to suppress competition.

2. Whether the FPC may decide to remand the issues raised by protestant Cities in a Section 204 proceeding to some other unspecified and amorphous proceeding, unconnected with the proceeds of the financing objected to, solely because it finds it inconvenient to follow the statutory procedures of Section 204 of the Act.

STATEMENT OF THE CASE

A. *Introduction*

This proceeding involves the denial by the Federal Power Commission ("FPC") of protests and demands for hearing and investigation directed to an application for authorization to proceed with certain financings. The protests were based upon the assertions that the proceeds of the financings would, if the financing were not conditioned, be utilized in connection with conduct involving an unlawful combination or conspiracy to suppress competition and unlawful attempts to monopolize by the destruction of the competitive position of the Cities and others. The FPC held these contentions "irrelevant" and approved the financings in question without the requested hearing, investigations or conditions.[3]

The Cities of Lafayette and Plaquemine,[4] Louisiana, the protestants before the FPC, will sometimes be referred to as "the Cities." The Cities own and operate relatively small municipal electric systems to serve their citizens. Petitioner, Gulf States Utilities Company ("Gulf States" or "Gulf") is charged with entering into a combination or conspiracy, hereafter described, with two other privately owned electric

[3]The FPC, although technically a respondent here, continues to support the position of Gulf States, and has timely filed in support of petitioner.

[4]The City of Plaquemine, as distinguished from the better known Parish of Plaquemines, is located across the Mississippi from Baton Rouge, Louisiana.

utilities, Louisiana Power & Light Co. ("LP&L"), and Central Louisiana Electric Company ("CLECO"). These three utilities are collectively referred to, for simplicity, as "the Companies."

The factual background of the proceeding, as alleged in the Cities' protests, turns about an attempt by the Companies to suppress and defeat an interconnection and pooling agreement between the Cities, Louisiana Electric Cooperative, Inc. ("LEC") and the Dow Chemical Company[5] and an associated attempt by LEC to escape the control of the Companies. LEC, a generation and transmission cooperative financed by the Rural Electrification Administration, is made up of twelve electric distribution cooperatives, all of which operate in Louisiana.[6]

B. *The Factual Background*

The factual background was set out in the Cities' pleadings before the FPC.[7] The three Companies generate, transmit and sell electricity at wholesale and retail in Louisiana, while Gulf

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[5]Dow, whose plant is situated convenient to the Lafayette-Plaquemine area, owns and operates approximately 400,000 kw of generation which it utilizes in its plant operations. Some of these operations may be interrupted for short periods of time without serious loss; consequently Dow's generation capacity can be used by other pool members as emergency stabilizing capacity to the extent of some 150,000 kw.

[6]For ready reference all parties referred to in this brief are as follows:

"FPC" or "The Commission"—the Federal Power Commission
"SEC"—the Securities and Exchange Commission
"The Cities"—the Cities of Lafayette and Plaquemine, Louisiana
"Gulf States"—Gulf States Utilities Company
"LP&L"—Louisiana Power and Light Company
"CLECO"—Central Louisiana Electric Company
"The Companies"—LP&L, Gulf States and CLECO
"LEC"—Louisiana Electric Cooperative, Inc.
"Dow"—Dow Chemical Company

[7]Following the decision of the Court of Appeals below, the FPC granted a new Gulf States financing application then pending, over the protest and petition to intervene of the Cities, but accepted that protest

States also does this in Texas. The three Companies are interconnected and engage in sales and exchanges of electricity. They are members of the eleven "South Central Electric Companies" which engage in a seasonal exchange of energy with the Tennessee Valley Authority. They are joint owners of major 500 kv transmission facilities in Louisiana.

In September 1964, the REA undertook to make a $56.5 million loan to LEC for construction of a 200 mw[8] generating station with 1,611 miles of transmission lines through which LEC could serve eight of its twelve member cooperatives.[9] Prior to the grant of the loan, the three Companies, which had been selling power to these coops, had at the same time been duplicating cooperative lines, and building facilities to serve new loads which developed in territory previously served by the coops (J.A. 71-72).

The actual use of the appropriated money, however, was paralyzed for more than five years by a series of entirely unsuccessful (except in delaying the use of the moneys) law suits, by the Companies themselves, and by other putative plaintiffs through the Companies' attorneys (J.A. 72-75).

In August 1968, during the period of delay, the Cities, Dow and LEC executed an Interconnection and Pooling Agreement providing for the interconnection of their generating systems and a long term pooling and coordination arrangement, with a minimum term of ten years. That agreement was

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and petition to intervene as a complaint in a new proceeding, docket No. E-7676. The developments of that proceeding, over the vigorous delaying tactics of the Companies, until brought to a halt by the FPC following the grant of certiorari in this case are part of the common background assumed by all the parties hereto. A chronology of that proceeding is set out at Appendix B, hereto, pp. 52-61. Documents from that proceeding will be referred to, from time to time, in footnotes.

[8] A megawatt (mw) is a large unit of power equal to 1000 kilowatts (kw) or 1,000,000 watts.

[9] A cooperative association which serves its members with generation and transmission services is frequently referred to as a "G & T" coop.

approved by the REA Administrator on November 19, 1968. Under this agreement, the generation capacity of LEC would be pooled and future expansion coordinated with expansion of the existing facilities of the Cities and Dow, and LEC transmission facilities, designed to serve LEC's distribution cooperatives, would also be used to link the generating resources of the four pool members (J.A. 57-58).

Although Lafayette's present generating resources are interconnected with CLECO and Plaquemine's with LP&L, the pool agreement made available important economic benefits to the Cities. Under the pool there would be combined planning for the load requirements of the Cities, the LEC members and Dow. Thus there would be a market for all surplus capacity and secondary energy, and systems could size and time construction of new generators in the best interests of all the members of the pool, providing substantial capital savings and the advantages of the economies of scale. The pool would also provide for benefits in the form of back-up for each system and economy energy interchanges. The agreement contemplated that the pool could be expanded by the addition of the electric companies, if any wished to join (J.A. 57-58).

The Cities charged, and set out facts in support thereof, that the Companies had conspired to suppress competition by LEC and the Cities through the pool in order artificially to maintain their monopoly. Thus, the Cities alleged that the Companies had undertaken to prevent the LEC project and the related pool from going forward by blocking the disbursement of the loan funds through an extensive series of repetitive and unfounded law suits which the Companies had brought by agreement among themselves, both on their own behalf and through individuals ostensibly not associated with the Companies, questioning the propriety of the loan. In addition, the Cities alleged that the Companies had, during this period, conspired to mount a public relations drive designed to interfere with LEC's ability to operate, and to conduct an active lobbying effort in Congress and in the State legislature to cut off funds for LEC

and to create obstacles to its operation in Louisiana. The net effect of this combination and conspiracy, the Cities charged, was to hold up the loan money in litigation until January 1969, when a new REA Administrator was sworn into office (J.A. 72-75).

During the five years the Companies managed to hold up disbursement of the loan through their concerted efforts to utilize all the resources of the courts and administrative agencies so to do, the foreseeable inflation and load growth of the member systems of LEC had created a question as to whether the original loan would be adequate to finance all of LEC's needed generation and transmission (J.A. 75-76).[10] The new Administrator, based upon what are believed to be concerted and coercive demands made upon him by the Companies, while continuing to advance LEC the funds for the generating station, declined to advance funds for transmission capacity. This left LEC no alternative but to negotiate for transmission services with the Companies that had kept it in court for five years and had cost it some $250,000 in litigation expenses (J.A. 76).

In the negotiating sessions which followed, the Companies continued their combination and conspiracy by presenting a unanimous front to the coops and the other pool members.[11] Thus, while the LEC lines would have served the dual function of transmitting LEC power to its member coops and transmission of pool power among pool members, the Companies offered to supply transmission services only to some of the LEC members and refused to supply transmission services between pool members. Rather, the Companies demanded that LEC bind itself "to take all necessary steps to cancel, extinguish and terminate" the pool agreement. Not only did the Companies

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[10]The effect of inflation and load growth had apparently been foreseen by the Companies when they first combined to delay and obstruct the project.

[11]The Companies met in advance of each negotiating session to coordinate their own positions.

demand that LEC breach its obligations to the pool members, but they even insisted that LEC agree "to save and hold the Companies harmless from any claims of whatever nature arising out of or resulting from the aforesaid cancellation, extinction and termination of said Pooling and Interconnection Agreement" (J.A. 59, 148-149). Of course, if damages were assessed against the Companies and hence LEC under that clause, LEC would probably be destroyed, an objective apparently sought by the Companies.

Also, the Companies demanded that LEC limit the expansion of its generating plant to the 200 mw of capacity presently under construction, and that all power requirements of the 12 member coops, in excess of 200 mw, be supplied only by the Companies (J.A. 61, 126).

The object of the combination to destroy LEC and the pool was further demonstrated by the statement by a representative of Gulf States to one of the member coops, that Gulf States would not meet the power growth needs of its customer coops "until the G & T has been killed" (J.A. 60-61, 157).

The Cities set forth in their pleadings at some length the course of the negotiations to date, and the continued uniform position agreed upon by the Companies, together with the changes in that uniform position. Thus, all proposals to any of the pool members required the extinction of the long-term pool and coordination arrangement (J.A. 64). As the Cities noted, the collective activities by the Companies appeared to be a combination in restraint of trade to force a halt in LEC's development and the competition which would result therefrom, to expand or obtain monopolies in transmission and generation, to obtain captive markets which they would allocate among themselves on an exclusive basis, and to destroy the advantageous pool agreement of the Cities and Dow (J.A. 62).

C. *The Application*

On October 12, 1970, Gulf States filed an application with the FPC (J.A. 1 *et seq.*) requesting authorization for the

issuance of $30,000,000 in principal amount first mortgage bonds. As a jurisdictional utility not subject to the jurisdiction of the SEC under the Public Utility Holding Company Act of 1935, Gulf States is required to obtain the approval of the FPC under Section 204 of the Act for each security issuance. The application stated, *inter alia* (J.A. 5):

> J. *Purpose for which the securities are to be issued.* The proceeds from the sale of the New Bonds will be used by the Company to refund and pay off part of its commercial paper and short-term notes to banks to be outstanding as of the date of issuance. The Company estimates that on December 16, 1970, the date the securities are expected to be sold, there will be outstanding approximately $55,000,000 principal amount of commercial paper and short-term notes issued on various dates. The aforesaid commercial paper and short-term notes to banks constitute an issuance of securities previously authorized by the Commission (Docket No. E-7509).

The Cities, by petition of November 2, 1970 (J.A. 54, *et seq*) set forth at some length the assertions, outlined above, that Gulf States, in combination with LP&L and CLECO, had combined to suppress competition and injure the Cities in their competition. The Cities asserted that the combination which would be financed or refinanced by the bonds here proposed was an unlawful object, incompatible with the public interest, and neither necessary nor appropriate for, nor consistent with, the proper performance by Gulf States of service as a public utility. Consequently, the Cities opposed the grant of the requested authorization unless and until Gulf States purged itself of its violation of the antitrust laws and Section 10h of the Federal Power Act,[12] or unless the Commission conditioned its authorization upon the taking of such actions (J.A. 56-57). The Cities requested that the application be set

[12] See *infra*, pp. 19-20.

down for hearing unless Gulf States would agree to conditions establishing the original pool or its equivalent (J.A. 65).

On November 12, 1970, Gulf States filed its answer to the Cities' petition (J.A. 165 *et seq).*[13] Gulf States argued, *inter alia,* that the Cities' petition to intervene should be denied since the Cities had "no right or interest which could be affected in this proceeding, nor could Petitioners be aggrieved within the meaning of Section 313 of the Federal Power Act by any action of the Commission in this proceeding." (J.A. 167).

By Order of December 3, 1970 (J.A. 181 *et seq)* the Commission authorized the issuance of the bonds, granted intervention to the Cities, and denied the hearing sought. As here relevant the Order stated (J.A. 183):

> The requested approval of the issuance of the Bonds allow the Company only to change the form of a portion of its outstanding indebtedness, it does not call for the initiation of any construction or other program by the Company which might effect [sic] the interest of the Petitioners. The alleged violations which petitioners attempt to raise in this proceeding are irrelevant to a requested authorization of securities. There is no relief that the Commission can order in authorizing issuance of the Bonds for refinancing purposes that would have any effect on the interest of the Petitioners, or solve any of the problems outlined by them.[14]

In its formal findings, the Commission found, *inter alia,* that (J.A. 184):

> (4) The proposed issuance and sale of Bonds, as hereinafter authorized, will be for a lawful object,

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[13]This was the only one of the seven filings by Gulf subsequent to the Cities' intervention which Gulf saw fit to serve on the Cities.

[14]The Commission conceded after oral argument in the Court of Appeals that its action allowed Gulf States to increase its total indebtedness by $30,000,000. See page 14 infra.

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within the corporate purposes of Applicant and compatible with the public interest, which is appropriate for and consistent with the proper performance by Applicant or [sic] service as a public utility and which will not impair its ability to perform that service, and is reasonably necessary and appropriate for such purpose.

* * *

(6) The matters asserted and activities alleged in the filed protest and petition to intervene by the Cities of Lafayette and Plaquemine, Louisiana, are irrelevant to the purpose of issuing bonds to refund short-term indebtedness heretofore authorized by this Commission.

(7) The matters asserted and activities alleged in the filed protest and petition to intervene by the Cities of Lafayette and Plaquemine, Louisiana, do not raise any issue which requires a hearing.

By amendment filed December 9, 1970, Gulf States advised the Commission of the terms it proposed to accept in the financing (J.A. 186). By order (J.A. 186) issued that same day the Commission approved those terms and further found (J.A. 187):

(2) The proposed issuance and sale of Bonds hereinafter authorized, will be for a lawful object, within the corporate purposes of Applicant and compatible with the public interest, which is appropriate for and consistent with the proper performance of service by Applicant as a public utility and which will not impair its ability to perform that service, and is reasonably appropriate for such purposes.

On December 16, 1970, the Cities filed the petition for rehearing which is a statutory prerequisite to review under Section 313(a) of the Act (J.A. 188 *et seq*). In that petition the Cities noted that the Commission had necessarily accepted as

true for purposes of its orders all charges made by the Cities since it had failed to grant the statutorily required hearing (J.A. 188), and reasserted all grounds raised in their original petition (J.A. 189). The Cities also pointed out that the Commission could not have known for what purposes the monies authorized were used since the application in the short-term financing docket (E-7509) here changed to long-term had stated only that (J.A. 190):

> The proceeds from the Notes will be added to the *general funds* of the Company *to be used, among other things,* to provide part of the interim funds for construction expenditures. [emphasis supplied]

Consequently, the Cities urged, there could be no record support for the Commission's findings as to the object for which the bonds were issued, since the Commission could not have known what that object was, and Gulf States could, consistent with the representations made by the Cities, have utilized these monies for the furtherance of its combination in restraint of trade (J.A. 191-193).

The Cities also noted that it was unclear whether the Commission had intended to say that the issues raised were irrelevant because this was a refunding rather than a new funding (which the Cities believed to be factually in error) or were in general believed to be irrelevant to its functions under Section 204. At the very least, the Cities suggested, the Commission should have conditioned the funding authority so that it would not be used to the detriment of the Cities or in a manner inimical to the proposed pool, and started an investigation (J.A. 193).

By order of January 13, 1971, the Commission denied the Cities' petition for rehearing (J.A. 200). The Commission noted that the Cities had raised all the issues included in the original petition to intervene, and (J.A. 200):

> In addition, [the Cities] present the further argument that [Gulf States'] described use of the

> funds authorized in Docket No. 7567 and Docket No. E-7509, as set forth in the applications, are not sufficient to support the Commission's findings that the issuance of Bonds is for a "lawful object . . . compatible with the proper performance by (Gulf States of) service as a public utility . . ."

Rather than deal with this "further argument", however, the Commission merely went on to find that (J.A. 201):

> The grounds for rehearing set forth [by the Cities' present no facts or legal principles which would warrant any change in or modification of the aforementioned Commission orders . . .

and denied rehearing without mentioning the Cities' request for an investigation and for conditions in the order.

D. *The Court of Appeals' Decision*

In the Court of Appeals, this proceeding was combined for argument and decision with a similar case in which the Cities protested the approval by the Securities and Exchange Commission of a financing application by LP&L under Sections 6 and 7 of the Public Utility Holding Company Act of 1935, 15 USC 79f, g.[15] That Court reversed the decision of the FPC but upheld that of the SEC.

The Court held, as here relevant, that, as a general rule it might be observed that a host of decisions of this and other Courts have determined that the public interest is presumed to be disadvantaged when private enterprises are permitted to engage in anti-competitive agreements and restraints, although

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[15]The SEC action had been initiated, on the part of the Cities, by an October 9, 1970, letter-petition by the Cities to the SEC (J.A. p. 15 *et seq* in No. 24764 below). In that letter, in addition to spelling out the actions by which the Companies were attempting to destroy the Cities and the LEC pool, the Cities had requested, *inter alia*, a conference with the FPC and SEC staffs. Although this letter was also sent to the FPC, no response whatever was made by the FPC, and the only response by the SEC was its approval of the financing which the Cities opposed.

that presumption might be subject to rebuttal on analysis by the cognizant agency. The Court observed that the primary interpretation of Section 204 by the FPC had been in *Pacific Power & Light Co.*, 27 FPC 623 (1962). Without reviewing that decision or Commissioner Morgan's "vigorous dissent" at 27 FPC 631 and 1388, the Court below noted that the FPC majority there held, relying on the fact that Section 204 was copied almost verbatim from Section 20a of the Interstate Commerce Act, that the purpose of Section 204 was to prevent the issuance of securities which might impair a utility's financial integrity or its ability to perform its public utility responsibility. Since that interpretation by the ICC of Section 20a was thereafter reversed by this Court in *Denver & Rio Grande Western R.R. v. United States*, 387 US 485 (1967), the Court reviewed the position taken by the FPC in this case in the light of the *Denver & Rio Grande* opinion and found that position wanting.

The Court also held that the contention made by the FPC, that the Cities could not be injured by its approval because the application for financing approval sought only to replace short-term notes with long-term bonds, was lacking in substance since the approval freed an additional $30,000,000 in short-term note authorization, thus allowing Gulf States to increase its total debt. The FPC had failed to answer this point when repeatedly raised by the Cities, was unable to answer it at oral argument below, but had conceded that it was the case in a supplemental memorandum filed with the Court after the oral argument.

The Court also quickly disposed of the argument made by Gulf States below, that the Cities were not "aggrieved" and thus had no standing to seek review, under well-settled law.

SUMMARY OF ARGUMENT

This case, and the *Otter Tail* case this term[16] present to this Court the question of the inter-relationship of the antitrust

[16] *Otter Tail Power Company v. United States*, No. 71-991, presently pending.

laws and the Federal Power Act.[17] The basic issue here is whether the FPC may evade its statutory responsibility to determine, on the record, that an issue of securities is "for some lawful object . . . compatible with the public interest" by allowing, over the vigorous protest of Cities, a financing to take place without more than an extremely perfunctory shuffling of papers.

I

Many of the arguments in this case and in the *Otter Tail* case depend upon the assertion that the antitrust laws and the principles thereof were not intended to apply to the electric power industry. We shall show, not only that the antitrust laws have *not* been somehow "superseded" by the Federal Power Act, but that Congress has been sufficiently concerned with the anti-competitive practices of the electric power industry to take further steps to de-centralize that industry and, from time to time, intentionally to provide additional forums and remedies for those concerned, to attempt to force the giants of that industry to deal more fairly with the smaller publicly owned and small privately owned segments of the industry. The decision of this Court in *California v. FPC*, 369 US 482 (1962) demonstrates the applicability of the antitrust laws to the natural gas pipeline industry, and, necessarily, to the electric power industry as well. Decisions both by this Court and by the Federal Power Commission establish the reality of competition, on a wholesale or bulk power supply basis, in the electric power industry.

II

Section 204 of the Federal Power Act provides that the FPC may approve a financing for a public utility only after it

[17] These cases also raise the issue of primary jurisdiction, a subject aptly described by a respected commentator as "enveloped in obscurity". *Kestenbaum, Primary Jurisdiction to Decide Antitrust Jurisdiction: A Practical Approach to the Allocation of Functions*, 55 Geo L. J. 812, 813 (1966-67).

makes certain explicit findings as to the use of the proceeds of that financing. We shall demonstrate that Congress, in accordance with the legislative history and the statute, required the FPC to examine and approve the purpose for which the proceeds of a financing were to be spent before approving the application for that financing, and that the FPC's earlier decision that it could ignore the purposes for which the proceeds of the financing were to be expended rested upon premises which were not then and are not now accurate or appropriate. The decision of this Court in *Denver & Rio Grande Western R.R. v. United States*, 387 US 485 (1967) made clear that the premises on which the earlier FPC opinion was drafted are not accurate.

III

If, as is the case, the FPC must examine the purposes for which the proceeds of a financing will be used, and find that those purposes are consistent with the public interest, it may not approve a financing, without more, where it appears that the purpose for which the proceeds will be used is inconsistent with the antitrust laws of the United States. Such a financing can be approved only upon suitable conditions, so that the Commission can rationally conclude that the public interest is satisfied.

IV

Both the FPC and Gulf States suggest that the Commission can equally well treat the Cities' complaints of anticompetitive action by the Companies in some other kind of proceeding or that the Cities should find a remedy in a direct treble damage suit. We shall demonstrate that this Section 204 proceeding is the only kind of forum which offers rapid and effective relief at the FPC and that the other forms of relief suggested are likely to be ephemeral or so drawn out as to be virtually bootless. Consequently there is no basis for the attempt by the FPC to avoid the procedure established by Congress in Section 204 merely because that procedure is one which the FPC and Gulf States find inconvenient.

ARGUMENT

I

THE RELATION OF THE ANTITRUST LAWS TO THE FEDERAL POWER ACT

One of the basic fallacies in the arguments being made by the electric companies here is the contention directly made by *amicus* Public Service of Indiana and indirectly by Gulf States that the antitrust laws of the United States do not apply to the actions of electric companies subject to the jurisdiction of the FPC and thus that neither the FPC nor any other agency or Court need concern itself with the sort of conduct found here.[18] This contention, in addition to being in direct conflict with the teachings of this Court in *California v. FPC*, 369 US 482 (1962) and other cases, is also in direct conflict with the legislative history of the Federal Power Act, the holdings of the FPC, and the realities of the electric power industry in the United States. As we shall show, not only has the reality of competition in the electric industry on many levels always been recognized, but Congress has, from time to time, been forced to take steps to subject the industry to regulatory supervision beyond and in addition to the Sherman and Clayton Acts to attempt to ensure the maintenance of fair competitive practices.

A. *The Electric Power Industry and Competition*

The suggestion which is made by petitioners and *amicus*, Public Service of Indiana, that there is no competition in the electric industry, is startling, to say the least. The electric power industry in America is a multifarious one.[19] The greatest economic power and visibility is clearly in the two hundred largest privately-owned utilities which own and operate more than 75% of the generating capacity, and serve about 80% of the customers of the industry (1970 NPS, page I-2-4).[20] There

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[18]This position is also taken by some of the parties and *amici* in *Otter Tail*.

[19]See, in general, *1970 National Power Survey*, FPC (1971), Chapter Two. This document will be referred to as "1970 NPS".

[20]See Footnote 19, supra.

are, however, also about 200 small privately-owned systems, about 2,000 municipal systems and close to 1,000 REA cooperative systems which are also part of the industry (1970 NPS, pp. I-2-1 to I-2-8). Ordinarily, because of the heavy and duplicative capital outlay which would be involved, there is little, if any, competition for existing retail loads.[21] There is, of course, a great deal of competition between systems in seeking to attract new loads.[22] There is also competition for sales at wholesale, a matter as to which no statute has ever heretofore been thought to eliminate competition.[23]

B. *Competition as Seen by Congress in the Electric Industry*

The sort of competition involved in the electric industry has regularly been recognized by Congress, and was recognized in the passage of Part II of the Federal Power Act. Parts II and III of the Federal Power Act were passed as Title II of the Public Utility Act of 1935 (Title I of which was the Public Utility Holding Company Act of 1935). 49 Stat. 803. The Public Utility Act was passed consequent to the receipt by the Congress of a multi-volume study of the utility industry which had been completed, on reference, by the Federal Trade Commission. S. Doc. 92, 70th Cong., 1st Sess. In describing the electric industry, that Commission observed, *id*, Part 73-A, page 52:

> While ordinarily there is not actual competition between operating units under diverse ownership there is frequently potential competition in that a

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[21] One of the problems in Louisiana, however, was the duplication by petitioners and their co-conspirators of REA coop distribution lines to seek to take away existing customers of the coops, which were forced to purchase all their power from the companies and thus limited in their ability to compete.

[22] See, in general, *1964 National Power Survey*, FPC, Part II, pp. 365-367. This document will be referred to as "1964 NPS".

[23] See, in general, 1964 NPS part II, pp. 365-370.

> given operating system may readily extend its lines and service to municipalities . . . which are on the edge of the territory occupied and served by a rival system . . . . Moreover, there are hundreds of cases where municipalities own and operate their distribution lines and purchase at wholesale from private generating plants. Frequently there is no physical or engineering obstacle, but only one of policy to their making these purchases from more than one operating system. If these operating systems are independent of each other, the purchasing municipality is obviously in a better bargaining position than if they are controlled by the same holding company. . . . Decisions of the Supreme Court recognize the protection of potential competition as coming within the proper regulation of interstate commerce.

In general the FTC concluded that, because of the then existing judicial interpretation of the Sherman Act and the weakness of the then existing Clayton Act, these Acts were insufficient to deal with the problems caused by holding companies which eliminated competition among the operating utilities which they controlled, notwithstanding the existence in the industry of substantial and important intra-modal competition which ought to be preserved. *Id.* pp. 47-56.[24]

Out of the FTC recommendations came the Public Utility Act of 1935. Although that Act amended many of the sections of the Federal Water Power Act, which became Part I of the Federal Power Act, Congress did not amend or repeal Section 10h, 16 U.S.C. 803 (h), applicable to licensees such as Gulf States, which provides:

> That combinations, agreements, arrangements, or understandings, express or implied, to limit the output of electrical energy, to restrain trade, or to

[24]The FTC also set out several instances of the methods by which utility systems had overreached in take-over attempts of publicly owned plants, the details of which sound remarkably up to date. Senate Doc. 92, Part 72-A (70th Cong., First Sess.) pp. 230-235.

> fix, maintain, or increase prices for electrical energy or service are hereby prohibited.

Rather, Section 10h was among those Sections which were expressly incorporated as Part I of the Federal Power Act. See Section 212 of S 2796, 74th Cong. 1st Sess. (1935).

The competitive status of public and private electric systems was regularly recognized in the debates on passage of that bill. In support of that bill, Senator Bone, one of the bill's leading proponents, stated, 79 Cong. Rec. 8683 (1935), recognizing the competition in the industry:

> The propaganda machine of the power combine can spend money without regard to amount. Like another Caesar Augustus, it need only send forth the edict that the whole Nation be taxed, and it is done – taxed to supply the sinews of war to battle any sort of legislation or regulation, or to eliminate competition from public plants.

Congressman Eicher, a principal proponent of the bill in the House, also recognized the competitive situation when he explained the several bases for the dissolution of the holding companies on the floor of the House at 79 Cong. Rec. 10361 (1935):

> A third basis for Federal regulation and dissolution of utility holding companies is the familiar power of Congress to prevent monopolies or restraints of trade in interstate commerce. This power is not diminished by the fact that in each local community the operating company normally has a monopoly upon the distribution of electricity. The restraints of trade with which the Federal Government is concerned are those which come from the control by holding companies of the operating companies; such control prevents any competition in the purchase of electricity .... To the extent that the great holding companies control the facilities for the interstate distribution of electricity they prevent competition in

> the interstate transmission of electricity just as did the holding company in *Northern Securities Co. v. United States* (193 U.S. 197) prevent competition between railroads engaged in interstate commerce. The case just cited made plain the power of Congress to prohibit intrastate corporate devices which serve to restrain interstate competition. It appears clear that the power of Congress to dissolve the holding companies has the same constitutional foundation as the antitrust laws.

There is no legislative history which would indicate that Congress intended to immunize electric companies from the antitrust laws; rather, history is clear that Congress intended to go beyond the antitrust laws as they then stood and, in Title I, to break up the holding companies whether or not they had violated these antitrust laws. As Senator King, one of the leading opponents of the bill, urged in trying to halt its passage, 79 Cong. Rec. 8929 (1935):

> . . . *We need not a line of legislation, therefore, to show that the antitrust laws will apply to public utility companies as well as to any other companies; and under the procedure in many cases such illegal organizations might be dealt with in a satisfactory manner under the processes of the Courts.* Under the terms of the bill the holding companies are to be destroyed whether they promote commerce or restrain it; whether they are combinations or single individual entities; whether they increase competition or secure monopoly. Nothing is even said on the subject; and if it were, as I have indicated, the laws already on the statute books are ample to deal with the situation, and if such laws are not enforced that is no reason for the enactment of this proposed bill. We are indeed in an unfortunate position if Congress must at every session reenact every law that is not being enforced. [emphasis added]

Senator Wheeler, in support of the bill, stated its purpose, 79 Cong. Rec. 8400 (1935):

> . . . To limit the concentration of power of economic enterprise in the public interest so that it will not menace the safety of the Nation. If government has not the power to curb the economic fascism and the private socialism of holding company domination, the Federal Government would be without power to prevent the very dangers to democracy which the Supreme Court feared lurked in the National Recovery Act.

It thus appears quite clear that there was no attempt to exclude the electric power industry from the scope and reach of the antitrust laws in the passage of the Public Utility Act of 1935. Quite to the contrary, although many other regulatory statutes contain language which protect the regulated industry from antitrust consequences of actions which are approved by the agency,[25] there is no such protection or exemption given in the Federal Power Act.

Nor has there been any change in the structure of the electric industry in recent years which would lend weight to the contentions of those who suppose the antitrust laws somehow "superseded" by some amorphous intent of Congress in the passage of the Federal Power Act. Indeed, the history of the Atomic Energy Act plainly shows the contrary result.

The Atomic Energy Act of 1946, in Section 7(c), 60 Stat. 755, 764-765, expressly required the AEC to condition, after consultation with the Attorney General, the licenses it was authorized to issue, if "activities under any license might serve to maintain or foster the growth of monopoly, restraint of

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[25] e.g., Shipping Act, Section 15, 46 U.S.C. 814; Interstate Commerce Act, Section 5 (11), 49 U.S.C. 5 (11), Section 5A (9), 49 U.S.C. 5b (9); Federal Aviation Act, Section 414, 49 U.S.C. 1384.

trade, unlawful competition . . .", "to prevent these results . . ." There can be little doubt that these concerns of Congress expressed in Section 7(c) were applicable, *inter alia*, to the electric power industry. If there were any such doubt, however, it would be dispelled by subsequent history. The Atomic Energy Act of 1954, in Section 105, provided, for licenses which had "practical value", that the AEC consult with the Attorney General as to whether the proposed license to an electric utility would tend to create or maintain a situation inconsistent with the antitrust laws. Even by 1954, of course, it was apparent that licenses for power reactors would be issued primarily to existing electric companies.

When the Atomic Energy Act was amended in 1970, to revise the procedure for antitrust review when it appeared that the AEC would be forced to find that the multi-million dollar investments of the electric industry in nuclear generation had practical value, the AEC was again directed to make findings as to whether the activities under the license to be issued would create or maintain a situation inconsistent with the antitrust laws. 42 U.S.C.A. 2135 (c) (pocket-part). Since the 1970 amendments were in response to the decision of the Court of Appeals for the District of Columbia Circuit in *Cities of Statesville, et al. v. AEC*, 441 F 2d 962 (D.C. Cir. 1969), which specifically identified the large electric companies as those charged with practices inconsistent with the antitrust laws, there can be no question as to the portion of the industry whose practices Congress anticipated would be reviewed.

At all times, of course, the Atomic Energy Act has retained its proviso that expressly retains the applicability of the antitrust laws to the electric industry. Section 105 (a), 42 U.S.C. 2135 (a). As the Joint Committee report stated, S. Rep. No. 91-1247 (91st Cong., 2nd Sess., 1970), page 13; H.R. Rep. No. 91-1470 (91st Cong., 2nd Sess., 1970), page 13, "Subsection 105a wisely emphasizes that 'Nothing contained in this Act' – and this includes subsection 105 c – 'shall relieve any person from the operation' of the antitrust laws". As Congressman Price put it, 116 Cong. Rec. 34318-34319 (1970):

> Paragraph (5) does not preclude in any manner the right of the Department of Justice to pursue antitrust suits, civil or ciminal in nature, in the courts, whether or not there are involved parties, facts, or issues that were, or are being, considered by the Commission and nothing in the bill would preclude or limit the intervention or participation of the Department of Justice in proceedings before other regulatory agencies where antitrust issues are involved, and irrespective of whether they involve parties, facts, or issues pertinent to Commission proceeding.

See also statement of Congressman Holifield, 116 Cong. Rec. 34309 (1970); statements of Senators Pastore, 116 Cong. Rec. 39619 (1970); Aiken, 116 Cong. Rec. 39620 (1970); Metcalf, 116 Cong. Rec. 39621 (1970); and Hart, 116 Cong. Rec. 39621-39622 (1970).[26]

Thus it appears, quite plainly, not only that it has been clear to Congress that the antitrust laws have not been somehow magically "superseded" by the Federal Power Act, but that Congress has been sufficiently concerned with the behavior of the electric power industry to take further steps to de-centralize that industry and, from time to time, outside the antitrust laws directly, but consonant with the thrust and force thereof, to force the giants of that industry to deal more fairly with the smaller publicly-owned and small privately-owned portions of the industry.

C. *Competition in the Electric Industry As Seen By The FPC and the Courts*

The FPC, if there were any question, has made it clear that a small system is not bound to a single wholesale supplier of

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[26]There is no question that Congress understood that there might be enforcement of the antitrust laws directly in the electric industry as well as requiring the AEC to deal with these issues in licensing matters and other agencies to deal with them as appropriate. For these intentions of the Department of Justice were clearly set out and, indeed, relied upon by Congress. See, *e.g.*, in addition, Statement of Senator Kennedy, 116 Cong. Rec. 39948 (1970).

power, but may change its supplier as it deems best. *Alabama Electric Cooperative v. Alabama Power Co.*, 38 FPC 962 (1967); *Shrewsbury Municipal Light Department v. New England Power Co.*, 32 FPC 373 (1964), *affirmed; New England Power Co. v. FPC*, 349 F 2d 258 (1st Cir., 1965).[27] And this Court, too, in a series of cases shortly after the passage of the Public Utility Act of 1935, emphasized that, so far as service to a particular municipality was concerned, no electric company possesses "... a right to be immune from lawful municipal competition." *Alabama Power Company v. Ickes*, 302 U.S. 464, 480 (1938). Cf. *Tennessee Electric Power Co. v. TVA*, 306 U.S. 118, 138-140 (1939). None of these cases, of course, is consistent with the theory that competition has been abandoned in the electric industry above the retail level.

D. *The Decisions of This Court Under the Natural Gas Act*

This Court, in a case almost directly in point under the other major act administered by the FPC, the Natural Gas Act, has determined that the antitrust laws do in fact apply to the natural gas pipeline industry, and that, indeed, if a conflict of

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[27] See also the recognition by the FPC that it is bound to consider the effects of its actions on the competitive structure of the electric utility industry in *Commonwealth Edison Co.*, 36 FPC 927, 940-1 (1966), *affirmed sub nom Utility Users League v. FPC*, 394 F.2d 16 (7th Cir., 1968) *cert. denied* 393 US 953 (1968). The competition in the electric industry is not unique. In the cases decided under the Natural Gas Act, where the FPC has, in addition, control of market entry and exit, the Commission has determined that competition is frequently desirable. See, *e.g., Columbia Gulf Transmission Co.*, 37 FPC 118 (1967), *affirmed sub nom Atlantic Seaboard Corp. v. FPC*, 397 F.2d 753 (4th Cir., 1968); *City of Hamilton, Ohio*, 37 FPC 209 (1967), *affirmed sub nom Cincinnati Gas & Electric Co. v. FPC*, 389 F.2d 272 (6th Cir., 1968) *cert. denied*, 393 U.S. 826 (1968); *Alabama-Tennessee Natural Gas Co.*, 38 FPC 1069 (1967), *affirmed sub nom Alabama-Tennessee Natural Gas Co. v. FPC*, 417 F.2d 511 (5th Cir. 1969); *Algonquin Gas Transmission Co.*, 37 FPC 1128 (1967).

jurisdiction to decide a particular question does arise between the Commission and a district court hearing an antitrust suit, the district court has primary jurisdiction as to that matter. *California v. FPC*, 369 U.S. 482 (1962). See also *United States v. El Paso Natural Gas Co.*, 376 U.S. 651 (1964). In this respect, the contention being made in this proceeding and the *Otter Tail* proceeding, that the "comprehensive nature" of the regulation of electric companies under Part II of the Federal Power Act by the FPC excludes the applicability of the antitrust laws, is a very strange one. As is immediately apparent from examination of the regulatory schemes by which electric companies and natural gas pipelines are controlled by the FPC, the regulation of electric companies is substantially less rigorous than the regulatory scheme applicable to natural gas pipelines under the Natural Gas Act. The scheme of Part II of the Federal Power Act, based primarily upon the retail-wholesale distinction which leaves most electric companies subject to state regulation for their retail electric business, provides for direct regulation of certain specific functions of electric companies by the FPC, direct regulation of other functions by State public utility commissions, and, in other instances, no regulation at all for some functions other than by the enforcement of rights before various courts. As to those matters where it is given jurisdiction, of course, the FPC ordinarily is given broad statutory power to regulate effectively.

Thus, for example, the FPC, under Part II of the Act, is given no authority to regulate market entry, limited authority to control market exit, no cease and desist power, no authority to approve agreements allocating markets, and no direct certification authority over facilities. In the Natural Gas Act, on the other hand, the FPC has authority to certificate pipeline construction, to regulate market entry, to control all sales, and complete power over abandonment of service and thus over allocation of markets. In neither the Natural Gas Act nor the Federal Power Act does the FPC have express authority to immunize transactions from the antitrust laws.

As this Court made clear in *California v. FPC, supra,* the competitive situation in the natural gas industry (and, perforce, the electric power industry) is such as to require the application of the antitrust laws both by regulatory agencies and by the district courts in antitrust suits. As the Court stated, *id.* at 485, " . . . while 'antitrust considerations' are relevant to the issue of 'public interest, convenience and necessity' . . ., there is no 'pervasive regulatory scheme' . . . including the antitrust laws that has been entrusted to the Commission." Thus, as this Court there held, the antitrust laws apply, both directly, and through the functioning of the regulatory agencies. As we have demonstrated, this salutary result is consistent with the realities of the industry and the repeatedly expressed intent of Congress as well as the statutory scheme.

II

THE FPC IS REQUIRED TO APPROVE THE PURPOSE FOR WHICH THE PROCEEDS OF A FINANCING WILL BE SPENT

The Federal Power Act provides, in Section 204, that no electric public utility subject to the FPC's jurisdiction may issue any security "unless and until, and then only to the extent that, upon application by the public utility, the Commission by order authorizes such issue or assumption of liability",[28] unless the electric utility is a public utility holding company or a subsidiary thereof[29] or its security issues are regulated by a State Commission in the state of its organization and operation.[30] There is here no doubt that Gulf States may not issue any security unless authorized by the FPC under this Section.

The standards to be utilized by the FPC are those set out by the Act, Section 204(a):

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[28] Section 204(a), 16 USC 824c(a)

[29] Section 318, 16 USC 825q

[30] Section 204f; 16 USC 824c (f)

> The Commission shall make such order only if it finds that such issue or assumption (a) is for some lawful object, within the corporate purposes of the applicant and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the applicant of service as a public utility and which will not impair its ability to perform that service, and (b) is reasonably necessary or appropriate for such purposes.

Thus the Act expressly requires the Commission to make findings that the issue is, *inter alia*, 1) "for some lawful object", which is 2) "compatible with the public interest", 3) "which is necessary or appropriate for or consistent with the proper performance by the applicant of service as a public utility" and 4) "which will not impair its ability to perform that service", and 5) that the issue is "reasonably necessary or appropriate for such purposes."

If there were any question as to the requirement of the Act that the Commission concern itself with the purposes for which the proceeds of an issue of securities are to be spent, that question would be resolved by Section 204(b):

> The Commission, after opportunity for hearing, may grant any application under this section in whole or in part, and with such modifications and upon such terms and conditions as it may find necessary or appropriate, and may from time to time, after opportunity for hearing and for good cause shown, make supplemental orders in the premises as it may find necessary or appropriate, and may by any such supplemental order modify the provisions of any previous order *as to the particular purposes, uses,* and extent *to which, or the conditions under which,* any security so theretofore authorized or *the proceeds thereof may be applied,* subject always to the requirements of subsection (a) of this section [emphasis supplied].

If this were not enough to demonstrate the intent of the Congress to charge the Commission with oversight of how funds resulting from the issuance of authorized securities are utilized, Section 204(c) provides:

> No public utility shall, without the consent of the Commission, apply any security or *any proceeds thereof to any purpose not specified in the Commission's order*, or supplemental order, *or to any purpose in excess of the amount allowed for such purpose in such order*, or otherwise in contravention of such order [emphasis supplied].

Thus it is apparent that Congress sought to charge the FPC with oversight of the use by the utility of the proceeds of financings, and that the language of the Act itself so requires.[31]

The requirement of Section 204 that the FPC address itself to and approve the purpose for which the money authorized is to be spent is, of course, consistent with the legislative history of the Act. As we have shown, the Public Utility Act emerged, in substantial part, from the reports of the FTC to the

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[31]The FPC appears to restrict itself to the argument that Section 204 does not require it to consider the use of the proceeds of the financing. Gulf States, on the other hand, argues (brief, pp. 30 *et seq*) that even if the FPC is required to investigate anticompetitive actions in a Section 204 proceeding, its failure here so to do was a finding of fact which could not be set aside on appeal. This argument is based on the confusion of the FPC as to what it was doing, and its apparent assumption that the only effect of its order was to refinance certain securities. As we have noted, the Commission abandoned this point when, *after the oral argument below*, its then General Counsel discovered, and admitted to the Court, that the Cities had been correct when they asserted that the effect of the FPC order had been to authorize Gulf States to obtain some $30,000,000 more than it would have been able to obtain without the order.

Congress,[32] and the report of the National Power Policy Committee,[33] H. Doc. No. 137, 74th Cong., 1st Sess. (1935), reprinted in S. Rep. No. 621, 74th Cong., 1st Sess. (1935), pp. 55 *et. seq.* The National Power Policy Committee had recommended that, S. Rep. No. 621, *supra*, at 59, "Security issues should be limited to purposes necessary in the public interest, which accords with the ultimate purposes of the legislation . . .". And the FTC Summary Report, S. Doc. No. 92, part 73-A, 70th Cong., 1st Sess., at page 215, had suggested "the possibility of extending the jurisdiction of the Securities and Exchange Commission to the point of preventing the capitalization for holding companies in connection with promotion and any operations which are in fact illegal and incident to which capital funds are sought." Thus it is apparent that the progenitors of the Act had in mind precisely what the language of the Act requires.

Section 204(b) expressly provides that the Commission "after opportunity for hearing," may grant any application in whole or in part upon such terms and conditions as it may find necessary and appropriate. The FPC Regulations applicable to Section 204 applications, Regulations under the Federal Power Act, Part 34, at Section 34.9, 18 CFR. 34.9, expressly provide that a hearing may be necessary.[34] And the Administrative Procedure Act requires that Act's hearing procedure set out at 5 U.S.C. 556, 557 be applied whether a Section 204 decision is considered as a rule-making (see 5 U.S.C. 553 (c)) or an adjudication (5 U.S.C. 554) since Section 204 requires Commission findings "after opportunity for a hearing." These procedures would be meaningless under the decision of the F.P.C.

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[32]Section 1, 15 U.S.C. 79a (b).

[33]The Act emerged in two titles of course, with functions split between the SEC and the FPC to prevent overlap and duplication.

[34]Gulf States' contention that (brief, pp. 34-35) the Act requires only an opportunity for the applicant to be heard and not for any

It is conceivable that an ingenious Commission which wished to avoid regulatory problems by narrowing its own jurisdiction might interpret the language of Section 204(a) if it stood alone, as merely requiring the Commission "to prevent the issuance of securities which might impair the company's financial integrity or its ability to perform its public utility responsibilities." But if the FPC had not so held, in *Pacific Power & Light Company*, 27 FPC 623, 626 (1962), over the strong dissents of Commissioner Morgan, 27 FPC 631, 1388, it would be hard to credit that reading to a responsible agency.[35] For this view requires that the agency blind itself to the purposes for which the proceeds of the security issues would be used, and this would render wholly nugatory the succeeding subsections of the Act, as well as the requirement of Section 204(a) that the object of the financing be "necessary or appropriate for or consistent with the proper performance by the applicant of service as a public utility".[36]

The FPC does not seriously attempt to rationalize or support its earlier decision in *Pacific Power & Light Company, supra*, except by reference to the rule that deference is given to an initial interpretation of the statute by the agency charged with its administration (Brief, page 21-22). Although it is

protestant to be heard is totally without merit. 5 USC 553(b), 554(b); 18 CFR 1.19. Indeed the FPC Regulations under Section 204 expressly require an applicant to submit "a form of notice suitable for publication in the Federal Register, which will briefly summarize the facts contained in the application in such way as to acquaint the public with its scope and purpose." 18 CFR 34.2 (q).

[35]Of course, at p. 628 the Commission there recognized that "the Commission must satisfy itself, of course, that the object is lawful and within the corporate purposes." Neither this recognition, nor the recognition of comparable duties in *Black Hills Power & Light Co.*, 31 FPC 1605 (1964), however, seem to have affected the Commission's propensity to ignore the object for which funds are to be spent.

[36]Thus the view which the Commission espoused would only ensure that a utility was *able* to perform its duties as a public utility, without attempting to ensure that the purposes of the financing were consistent with those duties.

difficult to demonstrate the error of the *Pacific Power & Light* decision more convincingly than did Commissioner Morgan at the time, in his dissent, the error may readily be shown. The efforts of Petitioners and the FPC to perpetuate a reign of error must fail, for, as this Court has observed, "even consistent error is still error" and should be corrected, once discovered. *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672, 678, Note 5 (1954).

In *Pacific Power & Light Co.*, the FPC determined, over strong dissent, that it need not look into the purpose for which the proceeds of the financing were to be spent. In so doing, it relied upon three distinct premises, each of which is demonstrably in error or fails to lead to a conclusion consonant with that of the Commission:

> 1. The Commission appeared to rely most heavily on the fact that "the criteria for approval of security issues in Section 204(a) are copied almost verbatim from Section 20a of the Interstate Commerce Act . . ." *id* at 627. The Commission analyzed the history of that Act and concluded that it, and therefore Section 204a of the Federal Power Act as well, were designed solely for the protection of the utility and its shareholders.
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> 2. The Commission also relied upon the fact that Congress had not, in the passage of Part II of the Act, given the FPC certificate jurisdiction over the construction of all facilities. *Id.* at 626.
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> 3. The Commission relied upon the fact that the FPC regulates, under Section 204, only the financings of those companies not subject to state financing regulation or that of the SEC under the Holding Company Act. *Id*, at 626.

As a result of its analysis of these premises, the Commission majority concluded, *id* at 628, that its duty under Section 204 required that the Commission "must satisfy itself, of course, that the object is lawful and within the corporate purposes.

Beyond that, we must inquire whether the contemplated investment would impair the company's ability to perform its normal functions as a public utility. The Commission might look to whether the investment is so improvident, frivolous, or speculative, that it threatens to squander the corporate substance without reasonable hope of return."

Beyond the fact that the Commission majority in *Pacific Power & Light* did not attempt to rationalize the result there reached with the language of the statute itself (an attempt which appears to be impossible of success and which neither petitioners nor the FPC even purport to accomplish in their briefs before this Court), the premises upon which the Commission proceeded in that case do not support the result reached in this. First, the reliance by the Commission upon the similarity in language between Section 204(a) and Section 20a of the Interstate Commerce Act is singularly inappropriate for the Commission's position here.

Of course, as Commissioner Morgan pointed out, *Id.* at 1394-1395, the Commission misquoted the commentator upon which it relied as to the ICC's lack of power in the analogous case there. But there is no question that the FPC's functions under Section 204 were modeled after those of the ICC under Section 20a of that Act, 49 U.S.C. 20a, S. Rep. No. 621, 74th Cong. 1st Sess. (1935), pp. 20, 50.

In these circumstances, the Cities believe that the decision of this Court in *Denver & Rio Grande Western R.R. v. United States,* 387 U.S. 485 (1967), interpreting the similar language of Section 20 of the Interstate Commerce Act, 49 U.S.C. 20, after which Section 204 was modeled, is dispositive here. As this Court held, at p. 492:

> We do not agree that Congress limited ICC consideration under § 20a to an inquiry into fiscal manipulation [footnote omitted]. Even if Congress' primary concern was to prevent such manipulation, the broad terms "public interest" and "lawful object" negate the existence of a mandate to the ICC to close

> its eyes to facts indicating that the transaction may exceed limitations imposed by other relevant laws. Common sense and sound administrative policy point to the conclusion that such broad statutory standards require at least some degree of consideration of . . . anticompetitive consequences when suggested by the circumstances surrounding a particular transaction.

Thus, the Court held, at 498:

> We conclude, therefore, that the ICC is required, as a general rule, under its duty to determine that the proposed transaction is in the "public interest" and for a "lawful object", to consider the control and anticompetitive consequences before approving stock issuances under § 20a(2).

The FPC attempts, at Page 18 of its brief, to distinguish *Denver & Rio Grande* on grounds which, if more closely examined, surely would not have been raised. Thus the Commission suggests that the ICC's "history of weighing anticompetitive consequences in other proceedings under Section 20a of the Interstate Commerce Act" should be contrasted to actions of the FPC under the Federal Power Act. An examination of the ICC's history relied upon by this Court in *Denver & Rio Grande, supra,* at 494-495, however, reveals that the actions in which anticompetitive factors were taken into account were almost precisely the kind of actions in which the FPC historically has taken such factors into account. These actions included the requirement of competitive bidding when securities are issued (see 18 CFR 34.1a) and the supervision of interlocking directorates (see 18 CFR 45; *John Edward Aldred,* 2 FPC 247, 260-261 (1940)).

The FPC also attempts to argue that because the FPC would have had jurisdiction elsewhere in the Federal Power Act to consider the anticompetitive consequences which this Court found in *Denver & Rio Grande,* if the transaction there had

been subject to its jurisdiction, this Court would not have reached the decision it did in that case if under Section 204 rather than the Interstate Commerce Act. This strained bit of logic should avail the FPC nought: there is no question what Section 20a means under *Denver & Rio Grande*; nor is there any question that Section 204 was intended to track Section 20a and to cover whatever Section 20a covered. See pp. 13-14, *supra*.

The Commission in *Pacific Power & Light Co.*, *supra*, at 626, also relied upon the fact that a section of the originally proposed bill which would have required Commission certificates of public convenience and necessity for all new construction of facilities was deleted in Committee as not presently necessary, to support its restrictive view. It failed to note, however, that in the same Committee, S. Rep. No. 621, 74th Cong., 1st Sess. (1935), p. 20,

> The security section, now Section 204 [was] rewritten to obtain greater flexibility and workability than would have been possible under the original section.

In short, what Congress obviously had in mind was the elimination of the tremendous amount of paperwork which would have been required if the FPC were required to certificate *each* new electric facility, while still retaining control over controversial projects in the form of oversight over spending.

The Commission also relied, in *Pacific Power & Light*, on the fact that it did not have security issuance jurisdiction over all electric utilities. This fact is also irrelevant here. To be sure, the FPC does not control the proceeds of security issuances of utilities which have security issuances regulated by the SEC (where the utility is a holding company or a subsidiary thereof, see Section 318 of the Act) or by a State Commission (see Section 204(f)). But there is no question that State Commissions can, and do, examine the uses to which proceeds of security issuances will be put, as Commissioner Morgan

pointed out in dissent in *Pacific Power & Light, supra,* at 639-640, 1396. *Old Dominion Electric Cooperative,* 86 P.U.R.N.S. 129 (1950); *Lowell Gas Light Company* v. *Department of Public Utilities,* 319 Mass. 46, 64 N.E. 2d 640 (1946). Indeed, since the *Pacific Power & Light* decision of the FPC, at least one State Commission acting under a statute closely similar to Section 204 has, with court approval, specifically limited the uses to which proceeds of a security issuance could be put in resolving an issue as to unfair competitive conduct in the context of a security issuance proceeding. *Alabama Power Company* v. *Alabama Public Service Commission,* 278 Ala. 597, 179 So. 2d 725 (S. Ct. Ala. 1965). In each of these cases, the State Public Service Commission examined the uses to which the issue or its proceeds would be put, held hearings and made decisions on the consistency of the intended use with the public interest.[37] Thus the expressed fear of the FPC that electric companies regulated by it would be put at some sort of competitive disadvantage in raising funds seems to come down to a fear that the Commission might have to follow the admonition of its statute and give those parties affected by the financings of those companies subject to Section 204 the same protection that is given by the states to those affected by financings regulated by the states.

Moreover, it is the view of the Cities that the SEC can, and should, resolve similar issues in approving security issuances under Sections 6 and 7 of the Public Utility Holding Company Act of 1935, and that the court below, while recognizing a wide area over which the SEC must take cognizance of anticompetitive consequences, erred in allowing the SEC to avoid that responsibility in the particular circumstances

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[37]Contrary to the suggestion of Gulf States (brief, p. 15), it is clear that State Public Service Commissions do, in fact, consider the Federal Antitrust laws when determining where the public interest lies. *E.g., Northern California Power Agency v. PUC,* 96 Cal. 18, 486 Pac. 2d. 1218 (S. Ct. Calif., 1971).

obtaining below. This is especially true in view of the repeated efforts of both the SEC and the FPC to transfer the jurisdiction over the Holding Company Act from the SEC to the FPC. See, most recently, S 3866, 92nd Cong., 2d Sess. (1972); explanatory letter appearing in Congressional Record for August 1, 1972, at S 12419.

In short, under the statutory language of Section 204, the legislative history of that section, and the decisions of this Court, the FPC must examine and approve the purposes for which the proceeds of a financing will be expended before it can authorize the financing. It remains only to demonstrate that, in examining the purposes for which the proceeds will be expended, the FPC must take into account the antitrust laws of the Nation, their thrust and purpose.

III

THE FPC CANNOT APPROVE A FINANCING FOR A PURPOSE INCONSISTENT WITH THE ANTITRUST LAWS WITHOUT CONDITION

The requirement of Section 204 that the FPC address itself to and approve the purpose for which the money authorized may be spent means, as we have seen, that the Commission must investigate the object for which the money is to be spent, at least when complaint is made. The Commission's primary contention here seems to be that it need not bother with the "formalities" required of it by statute in approving financings, thus need not ever consider *any* of the purposes for which the proceeds are to be spent, and, therefore, need not consider the anticompetitive impact or purposes either. As we have shown, that argument is completely inconsistent with the statute, its legislative history and with the decisions of this Court.

Secondarily, however, the FPC appears to assert that it has jurisdiction to consider anticompetitive problems in every substantive section of Parts II and III of the Act save Section

204[38]. The Cities agree that the FPC has the power and duty to consider anticompetitive factors, when applicable, under Sections 202, 203, 205, 206, 207, 306, 307, and 305. We fail, however, to find any defensible rationale for the Commission's conclusion that it lacks this power under Section 204[39].

As we have seen, *supra*, pp. 17-27, the basis upon which *amicus* Public Service of Indiana and Gulf States would exclude the applicability of the antitrust laws to the electric industry are without merit.[40] This leaves only the remaining Commission argument which is based upon the inconvenience of complying with the statute, a matter with which we deal *infra*, p. 40, *et seq.*

While it is clear that the FPC has no authority to enforce the Sherman Act or to make dispositive findings as to the matters which would be involved in the direct enforcement of the antitrust laws, *McLean Trucking Co.* v. *United States*, 321 US 67, 79 (1944); *California* v. *FPC*, 369 US 482, 486, 488 (1962), it is also clear that the Commission cannot ignore the antitrust laws, their policy and scope. As this Court stated in an analogous case, *Southern Steamship Co.* v. *NLRB*, 316 US 31, 47 (1941):

> It is sufficient for this case to observe that the Board has not been commissioned to effectuate the policies of the . . . Act so single-mindedly that it may wholly ignore other and equally important Congressional

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[38]Sections 202, 203, 205, 206, 207, 306, 307 (FPC brief, pp. 14-15). As noted, *supra*, p. 34, The Commission also takes anti-competitive factors into account in its supervision of interlocking directorates, the only remaining substantive section in Parts II and III of the Act, Section 305.

[39]We note that the Commission's order itself gave no such rationale, which may be one difficulty in its counsel's argument.

[40]Indeed, as this Court noted in *SEC v. New England Electric System*, 390 U.S. 207, 210 (1968), the Public Utility Act of 1935 was passed "to protect consumer interests through the 'elimination of "restraint of free and independent competition" '."

> objectives. Frequently the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task.

See also *Mansfield Journal Co. v. FCC*, 180 F 2d 28, 34 (D.C. Cir., 1950). And, as this Court pointed out in *FMC v. Svenska Amerika Linien*, 390 US 238, 245 Note 4, (1968), ". . . we have stressed that such an accommodation does not authorize the agency in question to ignore the antitrust laws." See also *McLean Trucking Co. v. United States*, 321 US 67, 79-80 (1944).[41] As the court below correctly pointed out, 454 F 2d at 948, there are "a host of decisions establishing that when an agency is called upon to determine whether a proposal or condition satisfies the 'public interest', or another similar broad standard, the agency has the authority and typically the responsibility to consider a challenge based on the asserted anticompetitive purpose or consequence of the proposal."

If there were any question as to the applicability of the policies of the antitrust laws to this sort of proceeding, however, they would be resolved by the holding of this Court in *Denver & Rio Grande, supra*. As this Court there held, in connection with the section of the Interstate Commerce Act after which Section 204 was modeled, *id*, at 492:

> We do not agree that Congress limited ICC consideration under § 20a to an inquiry into fiscal manipulation [footnote omitted]. Even if Congress' primary concern was to prevent such manipulation,

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[41] As this Court pointed out in *California v. FPC*, 369 U.S. 482, 490 (1962), the purposes of the antitrust laws and of the regulatory statutes administered by the FPC are complementary, *i.e.*, to achieve the most efficient allocation of resources for the Nation. See also, *Northern Natural Gas Co. v. FPC*, 399 F 2d 953, 959 (D.C. Cir., 1968); *City of Pittsburgh v. FPC*, 237 F 2d 741, 754 (D.C. Cir., 1956); cf. *Marine Space Enclosures v. FMC*, 420 F 2d 577 (D.C. Cir., 1969).

> the broad terms "public interest" and "lawful object" negate the existence of a mandate to the ICC to close its eyes to facts indicating that the transaction may exceed limitations imposed by other relevant laws. Common sense and sound administrative policy point to the conclusion that such broad statutory standards require at least some degree of consideration of . . . anticompetitive consequences when suggested by the circumstances surrounding a particular transaction.

Thus, the Court held, at 498:

> We conclude, therefore, that the ICC is required, as a general rule, under its duty to determine that the proposed transaction is in the "public interest" and for a "lawful object", to consider the control and anticompetitive consequences before approving stock issuances under §20a(2).

IV

THERE IS NO OTHER JUSTIFICATION FOR IGNORING THE STATUTORY REQUIREMENT

The FPC (*e.g.*, brief, pp. 8-19) and Gulf States (brief, pp. 25-29) assert that the Cities should be remitted to some other, unspecified, avenue of relief, because it might be inconvenient for the Commission or Gulf States to resolve the issues involved here in a Section 204 proceeding.[42] The attorneys for the FPC go so far as to declare (brief, p. 14) that a Section 202 proceeding would provide "a direct and adequate

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[42] It comes with something less than good grace for Gulf States, which through combination or conspiracy participated in blocking in its entirety the financing for LEC and its transmission for many years, to object, because there might be a slight delay in its financing, to the Cities' contention that the FPC should condition the financing authority on the cessation of illegality.

solution to Cities' need for transmission services". Unfortunately, there is no indication that such a statement was authorized by the Commission itself, and the Commission has held (albeit probably incorrectly) directly to the contrary. As we shall demonstrate, there is no satisfactory alternative avenue of relief open to the Cities.

As a matter of historic fact, there has long been a history of mistrust between the publicly owned systems and the private electric companies with the latter regarding the former as a natural enemy to be taken over, if possible, but in any event not to be assisted in any way. This tendency has been shown, most recently in the litigation before this Court, in *Gainesville Utilities Department v. Florida Power Corp.*, 402 U.S. 515 (1971) where Florida Power Corporation refused to enter into an inter-connection and pooling arrangement with a publicly owned system because, although that arrangement would benefit both parties, it would benefit Gainesville relatively more because of its isolated situation.[43] As a consequence of this mistrust, large electric companies have frequently been unwilling to interconnect with small or publicly owned electric systems.

Now that the *Gainesville* litigation is complete, the large electric companies frequently, as here, refuse to transmit power on reasonable terms for small or publicly owned electric systems or, similarly, refuse to offer coordination and other cooperation to publicly owned systems. Whether or not a small system could eventually obtain an agency order directing a large

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[43]Or as the president of one of the companies here put it in a report to his Board of Directors in June, 1969, in reporting on the joint efforts of the companies to halt the LEC program (pre-hearing exhibit B, FPC Docket No. E-7676), "Of course, construction will take from three to four years and, as you know, CLECO receives only approximately 4% of its gross revenue from all of the coops it serves and under the revised REA plan we will lose sales to only two of the coops with very little loss of profits–but it is the psychological and potential competitive position that we dislike."

company to furnish cooperation or services to it, the very fact that the agency process is, as this Court recognized in the *CATCO* case, *Atlantic Refining Co. v. Public Service Commission of New York*, 360 U.S. 378, 389 (1959); and in *FPC v. Hunt*, 376 U.S. 515, 527 (1964), "nigh interminable", especially when it involves intransigent parties who wish to delay agency action, virtually assures that a small system cannot prevail unless it is prepared to spend a very substantial sum of money and time to push its case and take or defend whatever appeals are necessary.[44] This is especially so when, as at present, the FPC staff is so depleted that virtually the entire case must be made by the small companies without staff help.

Thus it is frequently viewed by the large electric companies as being in their interest to refuse reasonable requests from small or publicly owned systems for service or cooperation and to litigate the small systems to death to ensure that they cannot obtain the desired order. When parties so disparate in size and resources come to grips without effective help from the FPC staff, it is unfortunately true that a proceeding which can be effectively delayed by the larger system will frequently deny the smaller system the justice it seeks.

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[44] As an example, one document made public as a result of the attempts by Gulf States to quash certain aspects of the Department of Justice CID, document No. 35, *Gulf States Utilities Co. v. Kauper*, M.D. La., Civil Action No. 71-102, demonstrates the determination of the companies to exhaust all substance from their small adversaries by prolonged litigation: "... if termination is dependent upon the Cities' success in the courts, it could run on for as much as fifteen years because Louisiana P&L plans to drag it through every court available to it." Documents from that proceeding, of which this Court may take judicial notice, will be referred to as "Document No. , *Gulf States v. Kauper*."

The Cities initially charged, and even the most limited discovery so far available has confirmed, the existence of a combination or conspiracy among the Companies to destroy LEC and the pool as potential competitors.[45] In the course of this combination or conspiracy the Companies refused to transmit power for LEC or the pool, while in combination bringing lawsuits and other forms of pressure to bear solely for the purpose of delaying the grant of the REA loan which would allow LEC to construct transmission line for its own use and for the pool. These lawsuits appear to have been jointly run by the so-called "legal committee" of the Companies[46] and, in some instances, to have been brought by the Companies' attorneys, but ostensibly on behalf of individual coop members who had been sought out and interviewed by the Companies for the purpose.[47] As the president of one of the Companies stated to his Board, shortly before the Companies decided to carry on their combination or conspiracy in restraint of trade through joint negotiations rather than by suit in the courts (after it became clear that any further suits would be thrown out peremptorily):

> Our efforts were not completely in vain as we delayed the project approximately 5 years and price escalation created problems in the cost of the project. In fact so much that the REA and Rural Electric Cooperatives have had to modify the plans as follows:

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[45]Document No. 1, *Gulf States v. Kauper*, shows that the top executives of each of the five privately owned electric companies in Louisiana met at ten o'clock A.M. on August 9, 1962, at the Capitol House Hotel "to discuss the recent formation of the Louisiana Electric Cooperative, Incorporated and to prepare a plan of action to oppose the $53,350,000 loan to this group by the REA for the purpose of constructing an electric generating station . . . and . . . transmission line within the State of Louisiana." That document further shows that the companies set up a detailed organizational structure through which they would coordinate their activities against the LEC.

[46]*E.g.*, Document No. 5, *Gulf States v. Kauper.*

[47]Documents 12 through 16, *Gulf States v. Kauper.*

(a) Same plant capacity - 200,000 kw.
(b) Service from the plant to four instead of eleven member cooperatives.
(c) 284 miles instead of 627 miles of 161 kv transmission lines.
(d) A reduction of the REA loan to the Louisiana cooperatives to $46,917,100.

Pre-hearing Exhibit B, FPC Docket E-7676.

Thereafter, although the Companies offered to negotiate with the REA on the basis that they would wheel power for the LEC generating plant to the load centers, thus obviating the need for LEC to build its own transmission lines, the Companies proceeded by prearrangement to negotiate on the basis of refusing to transmit power among the pool members or to coordinate with them in planning for growth to give the pool members the benefits of their LEC pool.

In short, by combination the Companies have forced the Cities, Dow and LEC to rely upon the transmission capacity of the companies, which they have adamantly refused to make available to the pool members.[48] Thus the intent of the Companies has been to block LEC construction of its generation for as long as possible, then when that was no longer feasible, to block any transmission not controlled by them and to block the LEC pool members from any access to the major cost advantages of power pooling.

The Cities came to the FPC (and the SEC) in an attempt to attain the prompt relief the administrative process was designed to afford to litigants. In both Commissions the Cities chose proceedings which 1) were of a nature such that the companies would wish to conclude them and therefore could not stall the administrative process excessively, and 2) had a direct nexus

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[48] A comprehensive study run by the Companies shows that their transmission network has more than adequate capacity for any transaction the pool members might engage in. See Document 405293; C 8253, obtained in discovery in Docket No. E-7676.

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with the complaints - i.e., the use of the monies authorized in the proceeding in the course of the conspiracy. In both Commissions the Cities were peremptorily denied relief with little (in the case of the SEC) or no (in the case of the FPC) explanation and with no alternative suggested.

The suggestion by the FPC attorneys in this Court that complete relief might be afforded in some other sort of proceeding is interesting, but apparently unauthorized. The FPC has twice held for example, that it has no power to order the transmission which the Cities and the pool require in a Section 202 proceeding. *City of Paris, Ky. v. Kentucky Utilities Co.*, 41 FPC 45 (1969); *Village of Elbow Lake, Minn. v. Otter Tail Power Co.*, 46 FPC ---- (Opinion No.603, September 13, 1971), *appeal pending, Otter Tail Power Co. v. FPC* (8th Cir. No. 72-1088). These decisions, it is true, turn on the question of whether the FPC can order a company to transmit for another, in vacuo, under Section 202, and not on the question here presented, whether the FPC could order a company *which already provides wheeling service for others* to cease its discriminatory refusal to provide the same sort of transmission service for the complainant under Section 205, which prohibits the granting of undue preferences to any person with respect to any service (such as transmission service) subject to the jurisdiction of the Commission, and also prohibits maintaining "any unreasonable difference in . . . service, facilities, or in any other respect . . .". See also Section 206. But it seems somewhat artless for the attorneys of the Commission to suggest, without more, in the light of the FPC cases to date, that a Section 202 proceeding will be a "direct and adequate solution to Cities' need for transmission service." (Brief, page 14).

The Commission, of course, whether or not it has the power to compel transmission under Section 202, has ample authority to condition its grants of authority, under Section 204 or otherwise, either upon the cessation of illegal practices or upon the transmission of power for others over

facilities of the applicant, when such transmission is not inconsistent with good operating practice, in order to cure for the future the illegal practices which have exited in the past. The Commission's conditioning authority under Sections 204 and 309, like that under the Natural Gas Act, is plenary. See, *e.g., United Gas Improvement Co. v. Callery Properties*, 382 U.S. 223 (1965); *FPC v. Sunray DX Oil Co.*, 391 U.S. 9 (1968); *Atlantic Refining Co. V. PSC of New York*, 360 U.S. 378 (1959); *Russell v. Farley*, 15 Otto 433, 26 L. Ed. 1060, 1063 (1882); *FPC v. Hunt*, 376 U.S. 515 (1964); *Texaco v. FPC*, 290 F 2d 149 (5th Cir., 1961); *Admiral - Merchants Motor Freight v. United States*, 321 F Supp. 353 (D. Colo., 1971) *affirmed*, 404 U.S. 802, rehearing denied 404 U.S. 987. Indeed, in comparable cases under Part I of the Act, the Commission has conditioned its authorization on the transmission of power for others. *Western Massachusetts Elec. Co.*, 39 FPC 723 (1968), affirmed, *Municipal Electric Association of Massachusetts v. FPC*, 414 F 2d 1206 (DC Cir. 1969); *FPC v. Idaho Power Co.*, 344 US 17 (1952).

The complaint proceeding, which the FPC initiated following the decision below on the basis of the Cities' Protest and Petition to Intervene in the second Gulf States financing proceeding, graphically demonstrates the ability of the Companies to stall when it is in their interest to do so. Quite aside from the fact that the FPC, on June 1, 1972, stayed all further proceedings in that case until after this Court has entered its decision in the instant proceeding, and confirmed that position on July 14, 1972, after vigorous objections from the Cities and Dow in their Petition for Rehearing, that case offers a textbook example of a situation where a plethora of voluminous outpourings by the Companies in the form of motions, objections, etc., all of which are eventually denied, have sufficiently clogged the machinery of justice as to bring the proceeding to a virtual halt. Judging from the proceedings so far, the Companies

hope to have the statute of limitations expire before they comply with basic discovery.

Moreover, the FPC has taken a financing case, where the Companies have the burden of proof, 5 U.S.C. 556(d), and by sleight of hand turned it into a proceeding where the Cities, which are injured by the actions of the proponents of the financing, are put to the burden of proof. The Commission itself, in its order of November 4, 1971, instituting Docket No. E-7676, stated:

> At such a hearing, the Cities, as proponents, shall have the burden of proving that such acts and practices of Gulf States Utilities Company are continuing, and to what extent the Commission has jurisdiction to remedy such acts and practices.

While the Cities have no objection to a proceeding like that established by the FPC, *if tied to a conditioning of the financing*, the present proceeding at the FPC offers little, if any, hope of an expeditious resolution of the problems which exist. When Gulf States refers to this proceeding (Brief, page 29, n. 61) as "a proper accommodation" of various policies, it is clear that it envisions years of litigation without relief, and the Cities fear just this result.

The suggestion by Gulf States (at Brief, page 28) that the Cities might bring a treble damage action (and cf. FPC brief, pp. 17, 8) is not responsive to the immediate needs of the Cities and their citizen consumers. While it is true that the Cities and their citizen consumers have been seriously injured financially by the conspiracy of the companies, the most pressing need is for transmission and pool cooperation, not damages. Moreover, the position of the FPC in the *Otter Tail* case before this Court - that having itself denied jurisdiction to give effective relief to Elbow Lake it will now attempt to ensure that Elbow Lake may obtain no relief elsewhere - makes the possibility of a treble damage suit even more costly and lengthy.

In short, the proceeding chosen by the Cities, in accordance with the statutory demand, is the only proceeding which is likely to lead to expeditious and effective relief. While the sort of proceeding now held in abeyance by the FPC might be appropriate, if the use of funds authorized were tied to the conclusions of that proceeding, thus furnishing some incentive for expedition to the Companies, that proceeding as it now stands, and the other proceedings suggested, are plainly unsatisfactory alternatives to the procedure established by Section 204.

CONCLUSION

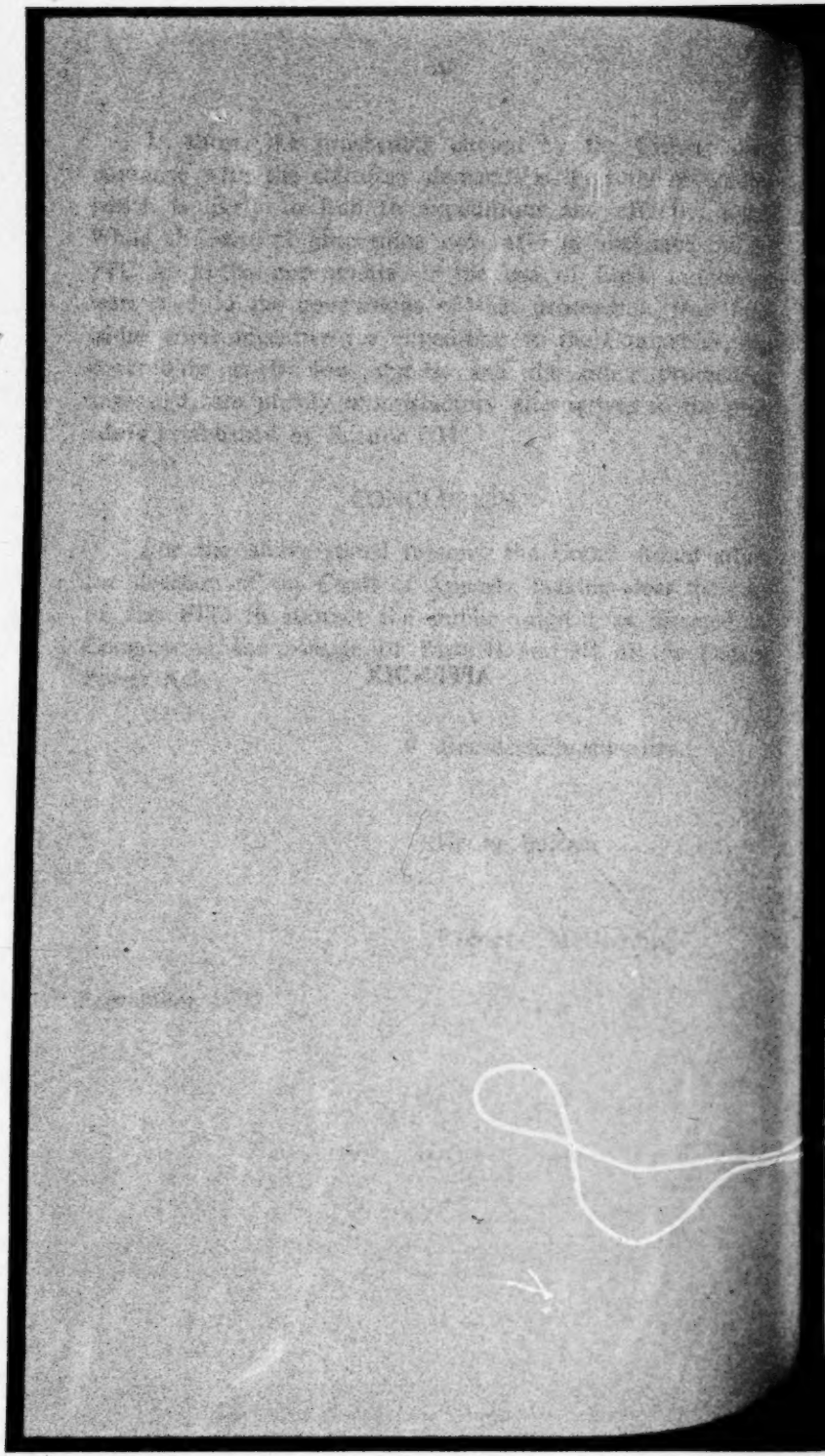
For the above stated reasons, the Court should affirm the decision of the Court of Appeals, making clear the duty of the FPC to protect the public interest as directed by Congress in the passage of Parts II and III of the Federal Power Act.

Respectfully submitted,

George Spiegel

Robert C. McDiarmid

September, 1972



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APPENDIX A

Section 204 of the Federal Power Act 16 USC 824c

§ 824c. ISSUANCE OF SECURITIES; ASSUMPTION OF LIABILITIES; FILING DUPLICATE REPORTS WITH SECURITIES AND EXCHANGE COMMISSION.

(a) No public utility shall issue any security, or assume any obligation or liability as guarantor, indorser, surety, or otherwise in respect of any security of another person, unless and until, and then only to the extent that, upon application by the public utility, the Commission by order authorizes such issue or assumption of liability. The Commission shall make such order if it finds that such issue or assumption (a) is for some lawful object, within the corporate purposes of the applicant and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the applicant of service as a public utility and which will not impair its ability to perform that service, and (b) is reasonably necessary or appropriate for such purposes. The provisions of this section shall be effective six months after Aug. 26, 1935.

(b) The Commission, after opportunity for hearing, may grant any application under this section in whole or in part, and with such modifications and upon such terms and conditions as it may find necessary or appropriate, and may from time to time, after opportunity for hearing and for good cause shown, make such supplemental orders in the premises as it may find necessary or appropriate, and may by any such supplemental order modify the provisions of any previous order as to the particular purposes, uses, and extent to which, or the conditions under which, any security so theretofore authorized or the proceeds thereof may be applied, subject always to the requirements of subsection (a) of this section.

(c) No public utility shall, without the consent of the Commission, apply any security or any proceeds thereof to

any purpose not specified in the Commission's order, or supplemental order, or to any purpose in excess of the amount allowed for such purpose in such order, or otherwise in contravention of such order.

(d) The Commission shall not authorize the capitalization of the right to be a corporation or of any franchise, permit, or contract for consolidation, merger, or lease in excess of the amount (exclusive of any tax or annual charge) actually paid as the consideration for such right, franchise, permit, or contract.

(e) Subsection (a) of this section shall not apply to the issue or renewal of, or assumption of liability on, a note or draft maturing not more than one year after the date of such issue, renewal, or assumption of liability, and aggregating (together with all other then outstanding notes and drafts of a maturity of one year or less on which such public utility is primarily or secondarily liable) not more than 5 per centum of the par value of the other securities of the public utility then outstanding. In the case of securities having no par value, the par value for the purpose of this subsection shall be the fair market value as of the date of issue. Within ten days after any such issue, renewal, or assumption of liability, the public utility shall file with the Commission a certificate of notification, in such form as may be prescribed by the Commission, setting forth such matters as the Commission shall by regulation require.

(f) The provision of this section shall not extend to a public utility organized and operating in a State under the laws of which its security issues are regulated by a State commission.

(g) Nothing in this section shall be construed to imply any guarantee or obligation on the part of the United States in respect of any securities to which the provisions of this section relate.

(h) Any public utility whose security issues are approved by the Commission under this section may file with

the Securities and Exchange Commission duplicate copies of reports filed with the Federal Power Commission in lieu of the reports, information, and documents required under Section 77*g* and Sections 78*l* and 78*m* of Title 15.

APPENDIX B

CHRONOLOGY OF EVENTS AT FEDERAL POWER COMMISSION SUBSEQUENT TO DECISION OF COURT BELOW

1. On September 30, 1971 the Cities had intervened in a Second Financing Application by Gulf States Utilities, Docket No. E-7663. In that intervention, the Cities sought to raise the issues previously raised in the proceeding now before this Court on review.

2. By answer dated October 7, 1971, Gulf States opposed the Cities' Petition to Intervene.

3. On October 12, 1971, the Opinion below was handed down.

4. On November 4, 1971, the Commission issued an Order in Docket No. E-7663 granting the authorization for issuance of securities sought by Gulf States. The Commission in that Order recognized the decision of the Court of Appeals below, but stated that that decision permitted the Commission to approve the entire application if it stood ready to proceed with hearing and consideration of the anti-competitive issues. The Commission stated that it would accept the Cities' Petition to Intervene and consider it as a complaint pursuant to Section 306 of the Federal Power Act to be set for a separate hearing.

5. By an Order Accepting Complaint issued November 4, 1971, in Docket No. E-7676, the Federal Power Commission accepted the Cities' Petition to Intervene in the Gulf States financing docket as a complaint and set that complaint for hearing. That Order stated, *inter alia*, "At such a hearing, the Cities, as proponents, shall have the burden of proving that such acts and practices of Gulf States Utilities Company are continuing or are likely to continue, and to what extent the Commission has jurisdiction to remedy such acts and practices." The Commission scheduled prepared testimony by the Cities in support of their allegations on or

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before January 3, 1972, and a hearing on February 8, 1972. The Commission also made LP&L and CLECO parties to the complaint proceeding.

6. On November 10, 1971, the Cities transmitted interrogatories and document requests to Gulf States, CLECO, and LP&L in accordance with the usual FPC practice. These interrogatories and document requests requested production for copying of documents in twenty-five specified categories, which documents were among those already produced by each of the Companies in response to a civil investigative demand by the Department of Justice, which CID had been made public in a suit to quash by Gulf States.

7. On November 19, LP&L responded to the Commission's order initiating the complaint proceeding, asserting, *inter alia,* that the Department of Justice, in its civil investigative demand under the Antitrust Civil Process Act had asserted primary jurisdiction to investigate these matters and take action and that the FPC therefore had no jurisdiction over the matters alleged.

8. On November 19, CLECO answered the complaint, denying the jurisdiction of the FPC, and further filed a motion to dismiss, alternative motion for more definite statement, and objections to the Cities' interrogatories on the grounds that it would refuse to answer without a subpoena and that the requests for documents were unduly burdensome, oppressive and expensive.

9. On November 26 the Cities responded to the motions of CLECO to dismiss and objecting to the Cities' interrogatories, pointing out, *inter alia,* that production of the documents sought could scarcely be unduly burdensome, oppressive or expensive to CLECO since all that was involved was running a set of documents already collated through a Xerox machine. In response to CLECO's refusal to produce documents, the Cities filed concurrently an application for issuance of subpoena for production of documentary evidence demanding the same documents which

had theretofore been requested voluntarily in accordance with the usual FPC practice.

10. On December 3, 1971, the Cities filed a petition for rehearing of the Commission's November 4 Order. The Cities pointed out that the procedure chosen by the Commission had the sum effect of removing the nexus with the statute pleaded by the Cities while putting the burden on the Cities to show another nexus. The Cities also objected to the allowance by the FPC of the financing application without considering at all the legality of the purposes for which the money was to be spent or even retaining the option of revoking authority or ordering Gulf States to cease and desist in accordance with the evidence to be produced in the hearing set by the Commission. The Cities also objected that the Commission was, in effect, taking the proceeding in which the companies had the burden of proof and turning it into one in which the Cities had the burden of proof, while giving the companies a significant interest to stall the new proceedings for as long as possible.

11. On December 1, 1971, the Dow Chemical Company petitioned for leave to intervene in support of the Cities.

12. On December 6, 1971, CLECO filed a motion to quash or to modify and limit the Cities' subpoena for documentary evidence. CLECO asserted that since the same documents had already been furnished to the Department of Justice in response to its CID, and Section 4(c) of the Antitrust Civil Process Act prohibited any person from examining the documents so furnished in response, CLECO would be in violation of that order and statute if it produced the same documents in response to an FPC subpoena.

13. On December 6, Gulf States filed a motion for the FPC to admit Dow Chemical Company as a party and for declaratory determination by FPC that Dow Chemical Company was a public utility within the Federal Power Act and a complaint against Dow Chemical Company for acts done

and omitted to be done in contravention of provisions of the Federal Power Act.

14. On December 6, Gulf States filed a motion to dismiss, and alternate motion for more definite statement in objection to the Cities interrogatories.

15. On December 7 the Presiding Examiner issued an order scheduling a pre-hearing conference and denying the Cities' subpoena request without prejudice. The Examiner scheduled the pre-hearing conference for December 21, 1971.

16. On December 9, 1971, CLECO filed further objections to the Cities' application for issuance of a subpoena and for production of documentary evidence.

17. On December 13 the Dow Chemical Company filed an answer to the Gulf motion of December 6.

18. On December 13 CLECO filed interrogatories to the Cities which, in effect, requested the Cities to put in the form of answers to these interrogatories their entire direct case due to be filed in prepared form in advance of hearing.

19. On December 16 the Cities responded to the CLECO interrogatories offering to attempt to work out a discovery schedule satisfactory to all parties. No response to that offer was ever received.

20. On December 16 the Cities filed responses to the December 6th motions of Gulf States.

21. On December 17 the Cities filed a response to the CLECO motion of December 6 and objections of December 9. The Cities pointed out that this Court had determined, in *St. Regis Paper Co. v. US,* 368 US 208, 217-219 (1961) that there could be no bar to proper process reaching papers in the hands of a respondent, regardless of whether those papers had already been furnished confidentially to the government in another case.

22. On December 21 the pre-hearing conference scheduled by the Examiner was held, but no issues were resolved. The Examiner scheduled a further pre-hearing conference on January 11.

23. On December 30, 1971, Gulf States filed a motion for expeditious consideration by the Commission of motions and a motion for clarification of the Commission's order of November 4, 1971.

24. On December 30, 1971, the Commission issued an order denying Cities' petition for rehearing in Docket Nos. E-7663 and E-7676.

25. On January 7, 1972, the Commission issued an order in Docket No. E-7676 denying Gulf States and CLECO motions to dismiss and their alternative motions for more definite statement which were filed November 19 and December 6, 1971.

26. On January 7, 1972, the Commission issued an order in Docket No. E-7676 granting intervention of Dow Chemical Company, denying Gulf States' motion for a declaratory determination that Dow was a public utility within the Federal Power Act, and dismissing Gulf States complaint against Dow Chemical.

27. On January 11, 1972, a second prehearing conference was held to discuss discovery. The FPC Staff suggested a very limited discovery, consonant with that suggested by the Companies. The Cities, and Dow, objected vigorously to the limitation of the Cities' proposed subpoena both in time covered and in scope.

28. On January 14, 1972, the Presiding Examiner issued an order requiring very limited production, both in time and in scope, of documents by CLECO, LP&L and Gulf States for discovery purposes.

29. On October 8, 1971, the Companies had filed an "interim" agreement with LEC which LEC had been forced to sign to enable it to dispose of the output of its nearly

complete electrical generation plant. That agreement called for the delivery of LEC power into the Companies' systems. On January 21, 1972, the Commission issued a notice of that rate schedule filing as Docket No. E-7696.

30. On February 1, 1972, Gulf States filed a petition for rehearing of the order issued by the Commission on January 7, 1972, granting intervention to Dow.

31. On February 1, 1972, Dow filed a motion to reject Gulf States' petition for rehearing filed that same date.

32. On February 8, 1972, a petition for leave to intervene in Docket No. E-7696 was filed by Dow.

33. On February 10, 1972, Cities filed a protest and petition to intervene in Docket No. E-7696 and a motion to reject or to grant alternative relief. The Cities pointed out that the agreement would allow the Companies to obtain the benefits of the LEC low cost power, to the exclusion of the other members of the LEC pool or the LEC member cooperatives, and requested that the filing be rejected if not conditioned on an agreement by the Companies to transmit power for the pool.

34. On February 15, 1972, a third pre-hearing conference was held by the Presiding Examiner. At that conference the Cities introduced certain of the documents which had been received in the initial discovery wave in order to demonstrate that the conspiracy and combination obviously went far beyond the limited discovery allowed by the Examiner and again moved for the grant of their initial subpoena. The Examiner denied the Cities' motion for the original subpoena stating (Tr. 198) "if you can show the Power Commission the tip of the iceberg, again why is it essential to get the whole iceberg exposed?". The Examiner did, however, allow the Cities to schedule depositions of certain of the Companies' executives.

35. On February 18, 1972, LP&L filed its response to the Cities' protest and petition to intervene in Docket No. E-7696.

36. On February 18, 1972, Gulf States filed an answer to the protest and petition to intervene filed by the Cities in Docket No. E-7696. In that answer, Gulf States contended, *inter alia*, that it would be beyond the jurisdiction of the Commission to order Gulf States to transmit energy for others.

37. On February 18, 1972, Gulf States filed an answer to the petition for leave to intervene of Dow in Docket No. E-7696.

38. On February 22, 1972, CLECO answered the petition for leave to intervene of Dow in Docket No. E-7696.

39. On February 22, 1972, CLECO answered the Cities' protest and petition to intervene in Docket No. E-7696.

40. On February 23, 1972, the Cities filed a motion to the Commission for extraordinary relief and/or reconsideration, pointing out to the Commission that the ambit of discovery, as ordered by the Examiner, would necessarily leave the Cities unable to show the scope of the combination or conspiracy among the Companies.

41. On February 25, 1972, the Commission issued an order, denying rehearing on its order of January 7, 1972, in response to the Gulf States' petition for rehearing.

42. On February 28, 1972, Dow filed a motion for extraordinary relief and/or reconsideration.

43. On March 2, 1972, Gulf States filed objections to the motions of Cities and Dow for extraordinary relief and/or reconsideration.

44. On March 6, 1972, CLECO filed objections in response to the motions of Cities and Dow for extraordinary relief and/or reconsideration.

45. On March 20, depositions began which continued until April 6, 1972, when the Commission issued an order granting the extraordinary relief sought by the Cities and changing the scope of discovery as ordered by the Examiner.

46. On April 3, 1972, CLECO filed a motion to compel Cities and Dow to furnish each of the Companies free copies of the depositions being taken.

47. On April 6, 1972, the Commission issued an order granting the extraordinary relief sought by the Cities' motion of February 23 and Dow's motion of February 28.

48. On April 6, 1972, the Commission issued an order in Docket No. E-7682 consolidating proceedings therein with those in Docket E-7676 insofar as the Cities' petition to intervene was considered a complaint, and authorizing the issuance of the promissory notes for which authorization had been sought.

49. On April 13, 1972, the Cities filed a response to the motion of CLECO to compel free copies of the deposition transcript.

50. On April 20, 1972, the Presiding Examiner issued a ruling denying the motion filed by CLECO to compel the Cities to provide free copies of depositions.

51. On April 20, 1972, the Presiding Examiner issued an order scheduling a fourth pre-hearing conference to be held on May 9, 1972.

52. On April 24, 1972, CLECO filed an answer to the Commission's order of consolidation of April 6.

53. On April 24, 1972, LP&L filed an answer to the Commission's order of consolidation dated April 6.

54. On May 2, 1972, Gulf States filed an application for rehearing of the Commission's order granting extraordinary relief.

55. On May 5, 1972, CLECO filed an application for rehearing of the Commission's order granting extraordinary relief.

56. On May 9, 1972, LP&L filed a petition for rehearing of the Commission's order granting extraordinary relief.

57. On May 9, 1972, yet another pre-hearing conference was held by the Presiding Examiner to discuss the scope of discovery.

58. On May 15, 1972, the Presiding Examiner issued an order requiring production of documents for discovery purposes in the form initially requested by the Cities in November, 1971.

59. On May 30, 1972, this Court granted the petition for a writ of certiorari by Gulf States.

60. On May 31, 1972, Gulf States filed a telegram as a supplement to its application for rehearing filed May 2, 1972.

61. On June 1, 1972, LP&L filed a telegram as a supplement to its petition for rehearing.

62. On June 1, 1972, CLECO filed a telegram as a supplement to its petition for rehearing.

63. On June 1, 1972, the Commission issued an order granting the applications for rehearing filed May 2, May 5, and May 9, 1972, noting that this Court had granted certiorari, and further providing that "the Commission has therefore determined that the public interest would best be served by staying all further proceedings in this Docket until the United States Supreme Court has entered its decision on appeal of *City of Lafayette, Louisiana v. SEC*, 454 F 2d 941 (CADC 1971)."

64. On June 1, 1972, the Commission issued an order denying rehearing of its order dated April 6, 1972, authorizing issuance of promissory notes.

65. On June 2, 1972, Gulf States filed a supplement to its application for rehearing dated May 2, 1972.

66. On June 8, 1972, Dow filed a petition for reconsideration of the Commission's order of June 1, 1972.

67. On June 15, 1972, Cities filed a petition for reconsideration and/or rehearing of the Commission's order of June 1, 1972, granting rehearing, pointing out that the result of the stay would be to prolong any action by the Commission for at least a year and to stay the discovery, which, on the evidence of record, would be prolonged by vigorous objections of the Companies and which could be going on whether or not the FPC wished to wait for this Court.

68. On July 14, 1972, the Commission issued an Order denying Cities' and Dow's applications for rehearing.

69. On August 7, 1972, the Commission issued an order in Docket E-7696 accepting rate schedules for filing, waiving notice requirements, granting intervention, granting late petition to intervene and consolidating proceedings with E-7676.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Interest of the United States	4
Statement	4
Summary of argument	10
Argument	13
I. The decision of this Court in *Denver & Rio Grande* is controlling here and requires the Federal Power Commission to consider competitive factors in deciding whether proposed securities issues are compatible with the public interest	13
II. The structure and legislative history of the Federal Power Act confirm the conclusion that the Commission must consider anticompetitive factors in determining whether a particular securities issue is compatible with the public interest	24
III. Consideration by the Commission of the anticompetitive consequences of securities issues, in the manner required by the court below, will not impair the utilities' ability to raise funds	37
Conclusion	39

487-564—72——1

CITATIONS

Cases:

	Page
Black Hills Power & Light Company, 28 FPC 1121	28
Black Hills Power & Light Company, 31 FPC 1605	28
California v. *Federal Power Commission*, 369 U.S. 482	18, 21, 23, 22
Commonwealth Edison Company and Central Illinois Electric and Gas Company, 36 FPC 927 affirmed *sub. nom. Utility Users League* v. *Federal Power Commission*, 394 F. 2d 16, certiorari denied, 393 U.S. 953	19
Denver & Rio Grande Western R. Co. v. *United States*, 387 U.S. 485	7, 8, 10, 13, 14, 15, 16, 17, 18, 19, 20, 24, 27, 28, 38
Federal Communications Commission v. *RCA Communications, Inc.*, 346 U.S. 86	21, 22
Federal Maritime Commission v. *Aktiebolaget Svenska Amerika Linien*, 390 U.S. 238	10, 21, 23
Jersey Central Co. v. *Federal Power Commission*, 319 U.S. 61	29
McLean Trucking Co. v. *United States*, 321 U.S. 67	17, 21
Municipal Electric Association of Massachusetts v. *Securities and Exchange Commission*, 413 F. 2d 1052	37
Municipal Electric Association of Massachusetts v. *Securities and Exchange Commission*, 419 F. 2d 757	37
National Broadcasting Co. v. *United States*, 319 U.S. 190	22

Cases—Continued

	Page
North American Co. v. *Securities & Exchange Commission*, 327 U.S. 686	29
Northern Natural Gas Co. v. *Federal Power Commission*, 399 F. 2d 953	21, 23, 32
Otter Tail Power Co. v. *United States*, probable jurisdiction noted, 406 U.S. 944	31, 32
Pacific Power & Light Company, 27 FPC 623	8, 27, 28
Pan American World Airways v. *United States*, 371 U.S. 296	34
Pittsburgh v. *Federal Power Commission*, 237 F. 2d 741	32
Port of Portland v. *United Statrs*, 408 U.S. 811	22, 23
Pott v. *Arthur*, 104 U.S. 735	14
Public Utilities Commission v. *Attleboro Steam & Electric Co.*, 273 U.S. 83	30
Statesville v. *Atomic Energy Commission*, 441 F. 2d 962	35, 36
United States v. *Philadelphia National Bank*, 374 U.S. 321	23

Statutes:

Atomic Energy Act of 1954, 68 Stat. 918, as amended, 84 Stat. 1472, 42 U.S.C. 2011, *et seq:*	
Section 104(b)	36
Clayton Act, 38 Stat. 730, as amended, Section 1, 15 U.S.C. 12, *et seq*	3
Section 7	17
Section 11	17, 23
Federal Power Act, 41 Stat. 1063, as amended, 49 Stat. 838, 16 U.S.C. 791a, *et seq*	3, 28
Section 202	31, 34, 35
Section 203	19, 20, 34, 35

Statutes—Continued

Federal Power Act, 41 Stat. 1063, as amended, 49 Stat. 838, 16 U.S.C. 791a, *et seq.*—Con. Page

Section 204 ..... 2, 5, 7, 9, 10, 11, 12, 13, 14, 15, 21, 24, 25, 26, 27, 28, 35, 36, 37, 39

Section 205 ..... 31, 34

Section 206 ..... 31, 34

Section 207 ..... 31, 34

Section 306 34

Section 307 34

Federal Water Power Act of 1920, 41 Stat. 1063, as amended, 49 Stat. 838, 16 U.S.C. 791a, *et seq.* 4, 28

Interstate Commerce Act, 24 Stat. 379, as amended, 49 U.S.C. 1, *et seq.* 3

preceding Section 1 18

Section 5 ..... 15, 17, 18, 20, 23

Section 20a 7, 10, 13, 14, 15, 17, 18, 20, 25, 27, 38

Natural Gas Act, 52 Stat. 821, as amended, 15 U.S.C. 717, *et seq.* 19

Public Utility Act of 1935, 49 Stat. 803 28

Section 213 ..... 24, 28, 30

Public Utility Holding Company Act of 1935, 49 Stat. 803, as amended, 15 U.S.C. 79, *et seq.* 3–4, 24, 28

Section 6 ..... 30, 36

Section 7 ..... 9, 30, 36

Section 8 30

Section 9 30

Section 10 30

Section 11 30

Shipping Act of 1916, 39 Stat. 733, as amended, Section 15, 46 U.S.C. 814 23

Miscellaneous: Page

79 Cong. Rec. 8392 29

35 Fed. Reg. 16649 5

Hearings Before the House Committee on Interstate and Foreign Commerce on H.R. 5423, 74th Cong., 1st Sess. 33

Hearings Before the Senate Committee on Interstate Commerce on S. 1725, 74th Cong., 1st Sess 30

H. Rep. No. 1318, 74th Cong., 1st Sess. 29, 31

Interstate Commerce Commission:

82d Annual Report (1968) 38

83d Annual Report (1969) 38

85th Annual Report (1971) 39

Meeks, *Concentration in the Electric Power Industry: The Impact of Antitrust Policy*, 72 Colum. Law Rev. 64 (1972) 32

S. 1725, 74th Cong., 1st Sess. 25

S. 2796, 74th Cong., 1st Sess. 25

S. Doc. No. 92, 70th Cong., 1st Sess.:

Report of the Federal Trade Commission to the Senate of the United States on Holding and Operating Companies of Electric and Gas Utilities, Parts 1–84D 29

Utility Corporations—Summary Report, Part 73–A 29, 33

S. Rep. No. 621, 74th Cong., 1st Sess. 14, 25, 29, 31, 32

Shenefield, *Antitrust Policy Within the Electric Utility Industry*, 16 Antitrust Bulletin (1971) 32

Sutherland, *Statutory Construction* § 5201 (3d ed.) 14

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1178

GULF STATES UTILITIES COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION,
CITY OF LAFAYETTE, LOUISIANA, AND
CITY OF PLAQUEMINE, LOUISIANA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-29a)[1] is reported at 454 F. 2d 941.

JURISDICTION

The judgment of the court of appeals was entered on October 12, 1971 (Pet. App. 30a), and a timely

[1] "Pet. App." refers to the appendix to the petition for a writ of certiorari filed in this Court by Gulf States Utilities Company. "App." refers to the separate appendix filed in this Court after certiorari was granted.

petition for rehearing was denied on December 15, 1971 (Pet. App. 31a). The petition for a writ of certiorari was filed on March 11, 1972, and was granted on May 30, 1972 (406 U.S. 956). The jurisdiction of this Court rests on 28 U.S.C. 1254(1) and on Section 313(b) of the Federal Power Act, 16 U.S.C. 825*l*(b).

QUESTION PRESENTED

Whether, in determining if an electric utility's application for authorization to issue securities is "for some lawful object, * * *, and compatible with the public interest," as required by Section 204(a) of the Federal Power Act, the Federal Power Commission must consider claims that the funds to be raised will be used for anticompetitive purposes.

STATUTES INVOLVED

Section 204 of the Federal Power Act, 49 Stat. 850, 16 U.S.C. 824c, provides in part:

> (a) No public utility shall issue any security, or assume any obligation or liability as guarantor, indorser, surety, or otherwise, in respect of any security of another person, unless and until, and then only to the extent that, upon application by the public utility, the Commission by order authorizes such issue or assumption of liability. The Commission shall make such order only if it finds that such issue or assumption (a) is for some lawful object, within the corporate purposes of the applicant, and compatible with the public interest, which is necessary or appropriate for or consistent with the proper

performance by the applicant of service as a public utility and which will not impair its ability to perform that service, and (b) is reasonably necessary or appropriate for such purposes. The provisions of this section shall be effective six months after August 26, 1935.

(b) The Commission, after opportunity for hearing, may grant any application under this section in whole or in part, and with such modifications and upon such terms and conditions as it may find necessary or appropriate, and may from time to time, after opportunity for hearing and for good cause shown, make such supplemental orders in the premises as it may find necessary or appropriate, and may by any such supplemental order modify the provisions of any previous order as to the particular purposes, uses, and extent to which, or the conditions under which, any security so theretofore authorized or the proceeds thereof may be applied, subject always to the requirements of subsection (a) of this section.

(c) No public utility shall, without the consent of the Commission, apply any security or any proceeds thereof to any purpose not specified in the Commission's order, or supplemental order, or to any purpose in excess of the amount allowed for such purpose in such order, or otherwise in contravention of such order.

* * * * *

Other pertinent provisions of the Federal Power Act, 16 U.S.C. 791a, *et seq.*, the Clayton Act, 15 U.S.C. 12, *et seq.*, the Interstate Commerce Act, 49 U.S.C. 1, *et seq.*, and the Public Utility Holding Company Act,

487-564—72——2

15 U.S.C. 79, *et seq.*, are set forth at Pet. App. 43a–59a and at FPC Br. App. 29–62.[2]

INTEREST OF THE UNITED STATES

This case raises an important question concerning the duty of the Federal Power Commission to consider anticompetitive factors in administering the Federal Power Act, 16 U.S.C. 791a, *et seq.* The United States is interested in the proper definition of the complementary roles of the regulatory agencies and the federal courts in furthering the fundamental national economic policy expressed in the federal antitrust laws. Consideration of antitrust factors by regulatory agencies in determining whether proposed conduct is in the "public interest" not only can serve to promote this fundamental policy, but also can have an important impact on the enforcement jurisdiction of the courts. By preventing in their incipiency transactions which might otherwise develop into full-blown violations of the antitrust laws or by conditioning approval of proposed actions on the remedying of past violations, an agency can make unnecessary prolonged and burdensome suits to enforce the antitrust laws.

STATEMENT

In October 1970 the Gulf States Utilities Company ("Gulf States"), an electric utility engaged in the generation, distribution, and sale at retail and for resale of electric energy in southeastern Texas and south central Louisiana (App. 5), applied to the Federal

[2] "FPC Br." refers to the Brief for the Federal Power Commission In Support of Petitioner, filed in this Court.

Power Commission for authorization pursuant to Section 204(a) of the Federal Power Act, 16 U.S.C. 824c(a), to issue $30,000,000 worth of long-term bonds (App. 1–52). The purpose of the bond issue was to refund part of the company's outstanding commercial paper and short-term notes (App. 5).[3]

After the Commission gave notice of the application, 35 Fed. Reg. 16649, the cities of Lafayette and Plaquemine, Louisiana, filed a protest and petition to intervene (App. 54–160), contending that the funds to be raised would not be used for a "lawful object" compatible with the "public interest," as required by Section 204(a) of the Act, but instead would be applied to finance or refinance attempts to suppress competition (App. 56–57). The cities alleged that Gulf States, the Louisiana Power and Light Company and the Central Louisiana Electric Company had for several years engaged in activities "apparently violative of the antitrust laws," as well as other federal statutes (App. 56).

The cities claimed that the three utilities had attempted to destroy the Louisiana Electric Cooperative ("LEC")—a generation and transmission electric cooperative financed by the Rural Electrification Administration (Pet. App. 5a)—and pointed to a history of "extraordinary litigation" by the utilities between 1964 and 1970 to prevent LEC from constructing generating and transmission facilities with loans which

[3] The company had used the proceeds from the notes to help finance its construction program and for other corporate purposes (App. 162).

had been approved by the Administration (App. 60, 71–74). The facilities would permit LEC to provide wholesale power to eight of its twelve member distribution cooperatives which at the time bought their power from the three utilities (Pet. App. 5a). The cities further charged that Gulf States and the other companies had agreed not to transmit LEC power on any of their lines unless a 1968 agreement among the cities, LEC and the Dow Chemical Company to establish an interconnection and pooling system was cancelled (App. 57–59). The cities claimed that the pooling arrangement would provide them with important economic benefits not available under their existing interconnection agreements with the three utilities (App. 58).

Accordingly, the cities requested that Gulf States' proposed financing not be approved unless conditioned upon cessation of the alleged anticompetitive activities and rectification of their effects. If Gulf States would not consent to such a condition, the cities asked the Commission to permit them to intervene as full parties and to hold a hearing to investigate the challenged activities and to determine whether and under what conditions Gulf States' financing should be approved (App. 56–57, 65–66).

In its answer (App. 165–176) to the cities' petition, Gulf States asserted that the purpose of Section 204 "is to prevent unsound financing which might impair the financial integrity of public utilities," and that, accordingly, the cities' allegations of unlawful activity—which it denied—were "irrelevant to this application" (App. 167, 173).

The Commission agreed with Gulf States. Denying the request for a hearing, the Commission issued a brief order authorizing the issuance of the bonds on the grounds that they were for a lawful object and compatible with the public interest (App. 181–185). As to the cities' protest, the Commission held (App. 184):

> (6) The matters asserted and activities alleged in the filed protest and petition to intervene by the Cities of Lafayette and Plaquemine, Louisiana, are irrelevant to the purpose of issuing bonds to refund short-term indebtedness heretofore authorized by the Commission.

The cities' petition for rehearing was denied (App. 201).

On petition for review, the court of appeals unanimously reversed the Commission (Pet. App. 1a–29a). The court referred to "the nation's profound and pervasive devotion to competition as a fundamental economic policy" (Pet. App. 13a), and cited numerous decisions to the effect that where an agency is called upon to determine whether a proposal is in the "public interest," the agency "has the authority and typically the responsibility to consider a challenge based on the asserted anti-competitive purpose or consequence of the proposal" (Pet. App. 12a). Noting that Section 204(a) of the Federal Power Act is virtually identical to the relevant portion of Section 20a of the Interstate Commerce Act, 49 U.S.C. 20a, the court found controlling this Court's decision in *Denver & Rio Grande Western R. Co.* v. *United States*, 387 U.S. 485

(Pet. App. 14a–16a).[4] The Court there held that the Interstate Commerce Commission, in deciding under Section 20a whether a particular issuance of securities is compatible with the public interest, must consider not only the financial integrity of the issuing company, but also the anticompetitive effects of the transaction. However, while holding that the Federal Power Commission similarly must consider the anticompetitive effects of proposed issuances of securities, the court below made clear that it was not imposing a requirement that evidentiary hearings on the antitrust issues be held in every case. Such issues could be disposed of without hearing if accompanied by an explanation, supported by the record, showing that no substantial anticompetitive issues were raised or that there was no "reasonable nexus between the activities challenged and the activities furthered by the application" (Pet. App. 22a).[5]

In the same opinion, the court of appeals also considered petitions filed by the cities to review two orders

[4] The court below declined to follow the Commission's decision in *Pacific Power & Light Co.*, 27 FPC 623, that in authorizing the issuance of securities under Section 204 it need consider only the impact of the securities on the issuer's financial integrity and ability to operate. The court held that *Denver & Rio Grande*, decided five years later, had undercut the rationale of that decision (Pet. App. 16a–19a).

[5] The court of appeals also indicated that the Commission might approve "a large portion of the application," reserving decision on the competitive issues, or might even approve an entire application, reserving until a later, separate application, in a different time frame, consideration of the competitive issues (Pet. App. 23a).

of the Securities and Exchange Commission under Section 7 of the Public Utility Holding Company Act, 15 U.S.C. 79g, authorizing the issuance of various securities by the Louisiana Power and Light Company. In authorizing issuance of the securities, the SEC had refused to hold a hearing on the cities' allegations of anticompetitive conduct—which were similar to the allegations made in the proceeding before the Federal Power Commission—on the ground that the alleged conduct was not relevant to the limited inquiry under Section 7 (Pet. App. 7a–8a). The court of appeals affirmed the SEC orders, holding that while the SEC has some jurisdiction over the structure of the power industry, it, unlike the Federal Power Commission, "has not been given any regulatory jurisdiction over operations of the company" (Pet. App. 27a), and thus need not as a general rule consider the impact of an applicant's operations on a competitor or potential competitor under Section 7 of the Holding Company Act (Pet. App. 29a).*

* In their memorandum in opposition to the petition in this case, the cities contended that there is no basis for distinguishing between the Securities and Exchange Commission's responsibilities under Section 7 of the Holding Company Act and the Federal Power Commission's responsibilities under Section 204 of the Federal Power Act and stated that they "reserve the right" to attack the affirmance of the orders of the SEC if certiorari were granted (Mem. in Opp., p. 3). But, since the cities did not petition from that aspect of the court of appeals' decision and since their time for petitioning had expired prior to the filing of their memorandum in opposition, the propriety of the SEC orders is not in issue before this Court.

SUMMARY OF ARGUMENT

1. Under Section 204(a) of the Federal Power Act, 16 U.S.C. 824c(a), a public utility may not issue securities until the Federal Power Commission has determined that the issue is "for some lawful object * * * and compatible with the public interest." Section 204(a) is directly patterned after, and is virtually identical to, Section 20a(2) of the Interstate Commerce Act, 49 U.S.C. 20a(2). In *Denver & Rio Grande Western R. Co.* v. *United States,* 387 U.S. 485, this Court held that the Interstate Commerce Commission is required to consider competitive factors before approving a stock issue under Section 20a(2). The decision in *Denver & Rio Grande* is controlling here, not only because similar statutory provisions are involved, but because the Federal Power Commission, like the Interstate Commerce Commission, has broad regulatory authority over the structure and operations of the industry it regulates.

The decision in *Denver & Rio Grande* is but a specific application of the general rule that agencies with broad economic regulatory powers must consider antitrust policies to give "understandable content to the broad statutory concept of the 'public interest.' " *Federal Maritime Commission* v. *Aktiebolaget Svenska Amerika Linien,* 390 U.S. 238, 244. In enacting regulatory statutes such as the Interstate Commerce Act and the Federal Power Act, Congress has entrusted federal agencies with economic regulatory authority over certain industries in partial substitution for free competition. But, with some exceptions not relevant

here, the antitrust laws continue to be applicable to such industries, and the agencies must administer their respective statutes in the light of the basic policies behind those antitrust laws. By giving the agencies the responsibility of scrutinizing transactions for anticompetitive consequences before the transactions are effected, Congress has made the agencies a first line of defense against anticompetitive practices which, if unchecked, might become full-blown violations of the antitrust laws. The agencies thus complement the courts in advancing antitrust policies.

2. The structure and legislative history of the Federal Power Act confirm that the Commission must consider anticompetitive factors in determining under Section 204 whether an issuance of securities is in the public interest. In adopting the broad public interest standard in Section 204 to govern securities issues, Congress specifically rejected a provision which would have limited the Commission's function to determining whether a securities issue was for one of several enumerated purposes. The clear implication is that in making this choice Congress intended that the Commission would take into account a broad range of considerations in authorizing securities issues. The fact that Congress expressed a particular desire to promote sound financial practices and eliminate fiscal manipulations is no indication that Congress wished the Commission to refrain from considering other fundamental public policies such as those expressed in the antitrust laws.

487-564—72——3

Section 204 was enacted as part of Title II of the Public Utility Act of 1935. Title I of that Act encompassed the Public Utility Holding Company Act, which was designed to curb certain abusive practices of public utility holding companies and diminish the high economic concentration among utilities by simplifying public utility holding companies and placing their future growth under federal supervision. Title II of the Public Utility Act encompassed Part II of the Federal Power Act and gave the Federal Power Commission substantial regulatory authority over the rapidly growing business of transmitting and selling at wholesale interstate electric power. In giving the Commission these powers, Congress was well aware of the special role of periodic competition in the electric power industry. The Commission concedes that it must weigh anticompetitive factors in determining what is in the public interest with respect to proceedings under many Sections of the Federal Power Act, but denies that it has any such obligation with respect to proceedings under Section 204. In view of the structure and legislative history of the Federal Power Act, there is no basis for concluding that the term "public interest" is used in a narrower sense in Section 204 than in other Sections of the Act.

3. The decision below gives the Commission sufficient flexibility so that it can consider anticompetitive consequences in connection with a proposed securities issue without unduly interfering with the timing of the sale of the securities. The Commission need not

dwell on the allegations of anticompetitive conduct, for example, if it finds that there is no substantial factual basis for such claims or that there is no rational nexus between the allegations and the proposed securities issue for which approval is sought under Section 204.

ARGUMENT

I. THE DECISION OF THIS COURT IN DENVER & RIO GRANDE [redacted] IS CONTROLLING HERE AND REQUIRES THE FEDERAL POWER COMMISSION TO CONSIDER COMPETITIVE FACTORS IN DECIDING WHETHER PROPOSED SECURITIES ISSUES ARE COMPATIBLE WITH THE PUBLIC INTEREST

In *Denver & Rio Grande Western R. Co.* v. *United States*, 387 U.S. 485, this Court held that the Interstate Commerce Commission, in performing its duty under Section 20a(2) of the Interstate Commerce Act (49 U.S.C. 20a(2)) to determine whether the issuance of particular securities is "for some lawful object * * * and compatible with the public interest," must as a general rule consider the anticompetitive consequences of the issuance. 387 U.S. at 498. When Congress vested in the Federal Power Commission substantially the same responsibility with respect to the securities issues of electric power utilities, it similarly required the Commission under Section 204(a) of the Federal Power Act (16 U.S.C. 824c(a)) to authorize only issuances that are "for some lawful object * * * and compatible with the public interest." The virtually identical wording of these Sections of the two

Acts [7] was intentional; Congress patterned Section 204 (a) after Section 20a. S. Rep. No. 621, 74th Cong., 1st Sess., p. 20. It follows that *Denver & Rio Grande* is controlling here under the traditional principle of statutory construction that like provisions—and especially those intentionally alike—normally receive like interpretations. *E.g., Pott* v. *Arthur,* 104 U.S. 735; Sutherland, *Statutory Construction,* § 5201 (3rd ed.).

We need not rely on the similarity of the statutory provisions alone, however, for *Denver & Rio Grande* represents but a specific application of the broad doctrine of complementary regulation under which agencies with economic regulatory authority over particular industries are required to consider basic antitrust policies in carrying out their regulatory

[7] Section 20a(2) of the Interstate Commerce Act reads in pertinent part:

"* * * The Commission shall make such order [of authorization] only if it finds that such issue or assumption: (a) is for some lawful object within its corporate purposes, and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the carrier of service to the public as a common carrier, and which will not impair its ability to perform that service, and (b) is reasonably necessary and appropriate for such purpose * * *."

Section 204(a) of the Federal Power Act reads in pertinent part:

"* * * The Commission shall make such order [of authorization] only if it finds that such issue or assumption (a) is for some lawful object, within the corporate purposes of the applicant and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the applicant of service as a public utility and which will not impair its ability to perform that service, and (b) is reasonably necessary or appropriate for such purposes. * * *"

functions. While its authority is in certain respects not as broad as that of the Interstate Commerce Commission, the Federal Power Commission is vested with considerable economic regulatory power over the electric power industry. No meaningful distinction can be drawn between the case at bar and *Denver & Rio Grande*.

1. *Denver & Rio Grande* arose out of an application by the Railway Express Agency for approval under Section 20a of the Interstate Commerce Act of the issuance of 500,000 shares of common stock (which when issued would constitute 20 percent of its outstanding common stock) to the Geryhound Corporation, a competitor in the express business. An agreement between Railway Express and Greyhound contemplated that within 60 days of the issuance of the 500,000 shares, Greyhound would acquire an additional one million shares of common stock—enough to give it control of Railway Express. Only the proposed issuance of the 500,000 shares, however, was submitted for ICC approval. 387 U.S. at 489–490. Numerous rail and motor carriers complained that the proposed transaction was severely anticompetitive and therefore not in the public interest, and that, since it was a first step in the acquisition of "control" of Railway Express by Greyhound, a hearing was required under Section 5(2) of the Act, 49 U.S.C. 5(2).[8] 387 U.S. at 489–490.

[8] Under Section 5(2), a carrier acquiring control of another carrier must obtain the approval of the Interstate Commerce Commission, which can act only after affording "reasonable opportunity for interested parties to be heard." Section 5(2)(b).

The Commission refused to consider the anticompetitive issues and approved Railway Express' application without a hearing. 387 U.S. at 491. On appeal from an order of a three-judge court upholding the Commission's approval, this Court reversed.

While agreeing that the Commission did not abuse its discretion in deferring a hearing under Section 5 until it became clear whether or not Greyhound would acquire the additional 1,000,000 shares of common stock and thus obtain "control" of Railway Express (387 U.S. at 499–500), the Court held that the Commission should have considered the anticompetitive issues raised prior to authorizing the issuance of 500,000 shares under Section 20a. The Court rejected the Commission's argument that Section 20a was intended solely to protect stockholders and the public from fiscal manipulation, stating (387 U.S. at 492):

> * * * Even if Congress' primary concern was to prevent such manipulation, the broad terms "public interest" and "lawful object" negate the existence of a mandate to the ICC to close its eyes to facts indicating that the transaction may exceed limitations imposed by other relevant laws. Common sense and sound administrative policy point to the conclusion that such broad statutory standards require at least some degree of consideration of control and anticompetitive consequences when suggested by the circumstances surrounding a particular transaction. * * *

The Court noted that the Commission is required to weigh anticompetitive effects in determining under

Section 5 of the Act whether a proposed merger or acquisition of control is "consistent with the public interest" (see *McLean Trucking Co.* v. *United States*, 321 U.S. 67), and concluded that the "foundations of the ICC's obligations under § 5 are largely applicable to § 20a as well." 387 U.S. 492–493.

In holding that the Interstate Commerce Commission is required, as a general rule, to consider anticompetitive consequences prior to approving stock issues under Section 20a, the Court stated that in some cases the Commission might legitimately decline to hold a hearing or defer consideration of the anticompetitive issues. In such circumstances, however, the reviewing courts must "closely scrutinize" the Commission's action. 387 U.S. at 498. With respect to Railway Express' proposed issuance of 500,000 shares of common stock, the Court found the anticompetitive issues sufficiently serious to require pre-issuance consideration by the Commission. 387 U.S. at 501–507.

2. Gulf States attempts (Br. 6–9) to distinguish *Denver & Rio Grande* on the ground that the Court, in discussing the Interstate Commerce Commission's overall responsibilities, focused on the Commission's specific obligation under Section 11 of the Clayton Act (15 U.S.C. 21) to enforce Section 7 of that Act (15 U.S.C. 18) against common carriers subject to its jurisdiction [9] and on the Commission's general duty to advance the competitive policies reflected in the Na-

[9] The complainants had alleged that Railway Express' issuance of securities would violate Section 7 of the Clayton Act. 387 U.S. at 490–491.

tional Transportation Policy (49 U.S.C. preceding Section 1). 387 U.S. at 493. Gulf States points out (Br. 9) that the Federal Power Commission is not obligated to enforce the Clayton Act or advance the National Transportation Policy.

The Court's decision in *Denver & Rio Grande,* however, did not turn on the Interstate Commission's duties with respect to the Clayton Act, nor was it confined to consideration of the National Transportation Policy. In referring to those duties, the Court was merely illustrating the scope of the Commission's regulatory obligations to underscore the illogic of the Commission's narrow reading of the terms "lawful object" and "public interest" contained in Section 20a. Indeed, immediately after noting that the Interstate Commerce Commission is required to weigh anticompetitive consequences in determining whether merger or acquisition of control applications are "consistent with the public interest" under Section 5 of the Interstate Commerce Act, the Court added that (387 U.S. at 492–493):

> * * * similarly broad responsibilities are encompassed within like broad directives addressed to other agencies. *E.g., National Broadcasting Co.* v. *United States,* 319 U.S. 190, 224; *FCC* v. *RCA Communications, Inc.,* 346 U.S. 86, 94; *California* v. *FPC,* 369 U.S. 482, 484–485.

Of particular relevance here is the Court's citation to *California* v. *Federal Power Commission.* In the

cited passage, the Court in that case stated (369 U.S. at 484–485):

> Evidence of antitrust violations is plainly relevant in merger applications, for part of the content of "public convenience and necessity" as used in § 7 of the Natural Gas Act is found in the laws of the United States. * * *

Significantly, neither the Clayton Act nor the Natural Gas Act, 15 U.S.C. 717, *et seq.*, confers upon the Federal Power Commission specific authority to enforce the antitrust laws; yet the regulatory authority of the Commission under the Natural Gas Act was held to be sufficiently broad to obligate it to consider the antitrust laws in approving merger applications. Similarly, under Section 203 of the Federal Power Act, 16 U.S.C. 824b, the Commission considers anticompetitive consequences in approving mergers of electric utilities (*Commonwealth Edison Co.*, 36 FPC 927, affirmed *sub nom. Utility Users League* v. *Federal Power Commission*, 394 F. 2d 16 (C.A. 7), certiorari denied, 393 U.S. 953), although here too the Commission lacks the specific authority to enforce the antitrust laws.

The applicability of *Denver & Rio Grande* to the present case is thus clear: the Court there reasoned that since the Interstate Commerce Commission has broad regulatory responsibilities and traditionally considers antitrust issues in determining whether a merger or acquisition of control is in the "public interest," it cannot exclude anticompetitive issues

from consideration in applying the similar "public interest" standard to an application for approval of an issue of stock. Similarly, since the Federal Power Commission exercises broad regulatory powers in administering the Natural Gas Act and the Federal Power Act and considers anticompetitive issues in approving mergers and acquisitions under those Acts, it must also consider such issues in determining whether the refinancing of short-term debt through the issuance of bonds is in the "public interest" under Section 204 of the Federal Power Act.[10] And, as we

[10] The Commission argues (FPC Br. 17–18) that in *Denver & Rio Grande* the Court was primarily concerned with the anticompetitive potential of the acquisition of stock of one carrier by another and that since Section 5(2) of the Interstate Commerce Act applies only when one carrier acquires "control" of another, the anticompetitive potential of stock acquisitions not involving a transfer of control could be considered only under Section 20a of the Act. By contrast, the Commission points out, *all* acquisitions of one utility's stock by another must be approved by the Commission under Section 203 of the Federal Power Act. The Commission's contention is that because it considers anticompetitive consequences in Section 203 proceedings, it need not consider them in Section 204 proceedings. But *Denver & Rio Grande* cannot properly be read so narrowly. In there construing the term "public interest" in Section 20a of the Interstate Commerce Act broadly, the Court did not confine its reasoning to cases where one carrier is acquiring the stock of another but announced a rule of general application that when the ICC considers any stock issued under Section 20a it must take into account alleged anticompetitive consequences. Both *Denver & Rio Grande* (387 U.S. at 498) and the decision below (see pp. 37–39, *infra*) do, however, permit summary disposition of antitrust allegations which are frivolous or have no reasonable nexus with the transaction for which approval is sought.

discuss in detail in point II, pp. 24–37, *infra*, the structure and legislative history of the Federal Power Act reenforce the conclusion that antitrust policy is as much a component of the "public interest" in the context of a Section 204 proceeding as it is in proceedings under other Sections of the Federal Power Act.

3. As the foregoing discussion indicates, *Denver & Rio Grande* is but a specific application of the general rule that agencies must consider the nation's fundamental policy of competition to give "understandable content to the broad statutory concept of the 'public interest'." *Federal Maritime Commission* v. *Aktiebolaget Svenska Amerika Linien*, 390 U.S. 238, 244. When an agency makes economic regulatory decisions under a broad "public interest" standard, the values of free economic competition reflected in the antitrust laws are too important to be ignored. *McLean Trucking Co.* v. *United States, supra*, 321 U.S. at 80; *California* v. *Federal Power Commission, supra*, 369 U.S. at 484–485; *Federal Communications Commission* v. *RCA Communications, Inc.*, 346 U.S. 86, 94. Nor is there necessarily any irreconcilable conflict between regulatory statutes and the antitrust laws, for both share the "basic goal * * * to achieve the most efficient allocation of resources possible." *Northern Natural Gas Co.* v. *Federal Power Commission*, 399 F. 2d 953, 959 (C.A. D.C.). To carry its burden of reaching this "basic goal," a regulatory agency which must decide whether a proposed transaction is in the "public interest" should at least consider whether the transaction would interfere with competition. In this

respect, it is not only conduct by the parties which would violate the antitrust laws to which the agency must be alert (see *National Broadcasting Co.* v. *United States,* 319 U.S. 190, 222–224), but also competitive considerations which may not rise to the level of violations of the Sherman or Clayton Acts (*Federal Communications Commission* v. *RCA Communications, Inc., supra,* 346 U.S. at 93–94).

The obligation of an agency to weigh competitive factors in administering a broad regulatory statute stems from two related sources: the agency's duty of economic oversight, which functions in partial substitution for free competition; and its concomitant duty to scrutinize regulated transactions in advance for compatibility with the public interest. If an agency is to meet these responsibilities effectively, it may not authorize a transaction which involves or results in violations of other laws also representing the competitive or regulatory policy of the United States, without even considering the policies embodied in those laws. Cf. *Port of Portland* v. *United States,* 408 U.S. 811, 841. If, on the other hand, an agency is sensitive to its broad responsibilities in determining what is in the "public interest," its scrutiny of a proposed transaction may uncover in its incipiency conduct which is inconsistent with basic antitrust policy. The agency must then determine whether that conduct is sufficiently serious and sufficiently connected with the proposed transaction to warrant either disapproving the proposed transaction as not being in the "public interest" or, if within the agency's power, conditioning approval on elimination of the anticompetitive

conduct. Through such pre-transaction scrutiny, agencies regulating economic activity function as the public's first line of defense against violations of fundamental antitrust policies.

Of course, except in the limited circumstances where agencies are empowered to enforce particular antitrust laws (see, *e.g.*, Section 11 of the Clayton Act, 15 U.S.C. 21), regulatory agencies applying the "public interest" standard are not engaged in the direct enforcement of the antitrust laws. An agency's consideration of antitrust considerations as one component of the "public interest" in approving a transaction, therefore, does not normally foreclose a direct judicial challenge to the transaction under antitrust laws. See *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 350–351; *California* v. *Federal Power Commission, supra.*[11] But a regulatory agency's jurisdiction serves as a complement to the enforcement jurisdiction of the courts in implementing the nation's overall economic policy (see *Northern Natural Gas Co.* v. *Federal Power Commission, supra,* 399 F. 2d at 959), and also serves to minimize the enforcement burden upon the courts by eliminating many potential offenses before they become full-blown violations.

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[11] Congress may, of course, expressly immunize certain types of approved transactions from challenge under the antitrust laws. See, *e.g.*, Section 5a(9) of the Interstate Commerce Act, 49 U.S.C. 5b(9); Section 15 of the Shipping Act, 46 U.S.C. 814. In these instances the agency's duty to consider alleged violations of other laws which have a rational nexus to the transaction in question is no less important. Cf. *Federal Maritime Commission* v. *Aktiebolaget Svenska Amerika Linien, supra; Port of Portland* v. *United States, supra.*

II. THE STRUCTURE AND LEGISLATIVE HISTORY OF THE FEDERAL POWER ACT CONFIRM THE CONCLUSION THAT THE COMMISSION MUST CONSIDER ANTICOMPETITIVE FACTORS IN DETERMINING WHETHER A PARTICULAR SECURITIES ISSUE IS COMPATIBLE WITH THE PUBLIC INTEREST

In point I we examined this Court's holding in *Denver & Rio Grande* that an agency with broad economic regulatory responsibility may not find a transaction to be in the "public interest" without considering whether the transaction is consistent with the fundamental economic policies expressed in the antitrust laws—a holding which is fully applicable to the Federal Power Commission. We shall now take a closer look at the pertinent language and legislative history of the Federal Power Act, and at the Act's legal setting.

1. Section 204(a) of the Federal Power Act prohibits electric utilities [12] from issuing securities until authorized to do so by the Federal Power Commission, and directs the Commission to authorize a securities issue only if it is "for some lawful object * * * and compatible with the public interest." Under Section

[12] Section 204(a) does not apply to utilities whose securities are regulated by State regulatory agencies (see Section 204(f)) or to holding companies subject to the Public Utility Holding Company Act of 1935, 15 U.S.C. 79, *et seq.* (see Section 213 of the Federal Power Act, 16 U.S.C. 825q). Contrary to Gulf States' contention (Br. 15–16), the fact that Congress chose to defer to State regulation of securities issues hardly proves that in the regulation which Congress did undertake it meant to limit agency consideration of securities issues to matters of financial integrity. Respect for federalism is not inconsistent with respect for competition.

204(b), the Commission may modify, or approve only part of, a proposed issuance of securities or may impose conditions in return for approval; under Section 204(c), a utility must spend the proceeds from the issuance of securities only for the purposes authorized by the Commission. The legislative history of Section 204 sheds some light on the undefined terms "lawful object" and "public interest."

The original version of the Section, as introduced in the Senate, contained no broad reference to the public interest, but instead enumerated four specific purposes for which a utility could issue securities.[13] The Senate Commerce Committee, in an effort "to attain greater flexibility and workability," cast aside the specific enumeration and substituted the present, general language of Section 204a, borrowed almost verbatim from Section 20a of the Interstate Commerce Act. S. Rep. No. 621, 74th Cong., 1st Sess., p.

[13] Section 206 of S. 1725, 74th Cong., 1st Sess., pp. 109–110 (which, when amended, became Section 204 of S. 2796—the bill which eventually was enacted), gave the Commission the authority to approve securities issuances:

"* * * if it finds that such issue * * * is for one or more of the following purposes and no others, and is reasonably necessary or appropriate for such purpose or purposes: the acquisition of property; the construction, completion, extension or improvement of the facilities or service of the public utility; the discharge or lawful refunding of its obligations; and the reimbursement of moneys actually expended from sources other than the issue of securities for any of the aforesaid purposes in cases where the applicant shall have kept its accounts and vouchers for such expenditures in such manner as to enable the Commission to ascertain the amount of moneys so expended and the purpose for which such expenditure was made."

20. Thus, the Senate specifically rejected a provision which would have limited the Commission's function in approving a securities issue to the relatively simple task of determining whether the issue is for one of certain enumerated purposes and substituted the far broader responsibility—deliberately copied from another regulatory statute—of determining whether the issue is for a "lawful object" and in the "public interest." And, in recognition of this broader responsibility, the Commission was given the power to place conditions upon approval (Section 204(c))—thus authorizing the Commission, for example, to approve an issue subject to the condition that none of the proceeds from the issue be used in connection with a particular transaction which, in the Commission's view, would not be in the "public interest."

Gulf States (Br. 12–18) and the Commission (FPC Br. 22–24) attempt to limit the scope of the terms "lawful object" and "public interest" by citing further legislative history indicating that in enacting Section 204 Congress was intent on promoting sound financial practices and preventing fiscal manipulation by utilities. While these indeed were major concerns of Congress, there is nothing in the legislative history to indicate that these were Congress' *exclusive* concerns and that other fundamental public policies, such as those expressed in the antitrust laws, should be excluded from consideration in determining what is in the "public interest." As this Court stated in

Denver & Rio Grande with respect to Section 20a of the Interstate Commerce Act (387 U.S. at 492):

> Even if Congress' primary concern was to prevent [fiscal] manipulation, the broad terms "public interest" and "lawful object" negate the existence of a mandate to the ICC to close its eyes to facts indicating that the transaction may exceed limitations imposed by other relevant laws. * * *

In the light of *Denver & Rio Grande*, there is no merit to Gulf States' (Br. 9–11) and the Commission's (FPC Br. 20–22) contention that the court below should have yielded to the Commission's earlier administrative ruling that the "plain purpose of Section 204 is to prevent the issuance of securities which might impair the company's financial integrity or its ability to perform its public utility responsibilities." *Pacific Power & Light Co.*, 27 FPC 623, 626. In that case, the Commission expressly recognized that Section 204 was modeled after Section 20a of the Interstate Commerce Act and concluded that Congress must have had similar objectives with respect to both statutes. 27 FPC at 627. Thus, when this Court in *Denver & Rio Grande* refused to give Section 20a a narrow reading, the basis of the Commission's decision in *Pacific Power & Light* was undermined and the court below correctly declined to follow it (Pet. App. 16a–17a).[14]

[14] The Commission's statement (FPC Br. 21) that it has consistently followed *Pacific Power & Light* is similarly of limited significance in view of the fact that, except for the instant case, the Commission decisions it cites were all handed down

2. In enacting the Public Utility Act of 1935, 49 Stat. 803, of which Section 204 was a part,[15] Congress had two important and related aims: to curb certain abusive practices of public utility holding companies and bring such companies under effective public control, and to provide effective federal regulation of the

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prior to the decision in *Denver & Rio Grande*. Moreover, the Commission has not always taken so crabbed a view of the "public interest" standard contained in Section 204. In *Black Hills Power & Light Co.*, 28 FPC 1121, and *Black Hills Power & Light Co.*, 31 FPC 1605, the Commission held that proposed stock issues for a restricted stock option plan were not compatible with the public interest under Section 204(a). Over the dissents of two commissioners who claimed that the Commission was deviating from its decision in *Pacific Power & Light*, the Commission explained: "The incentives under stock option plans, however, tend naturally to divert management from their responsibilities to the public and to focus their attention on maximizing prices and earnings in order to push stock quotations ever higher. * * * The electric power industry of today recognizes that it must perform its work with a broad regard for the interests of consumers and the general public, as well as the interests of stockholders and management. Stock option plans do not lend themselves to this balanced management attitude." 31 FPC at 1611–1612. Another way for the Commission similarly to insure "a broad regard for the interests of consumers and the general public" is to require utilities to conform their conduct to the policies expressed in the antitrust laws.

[15] Title I of the Public Utility Act was the Public Utility Holding Company Act of 1935, 49 Stat. 803–838, now codified as 15 U.S.C. 79, *et seq.* Title II of the Public Utility Act technically consisted of amendments to the Federal Water Power Act of 1920 (41 Stat. 1063), but in Section 213 of the Public Utility Act (49 Stat. 847) Congress added two major new parts (Parts II and III) to the Federal Water Power Act, and changed the name of that earlier Act to the Federal Power Act. Parts II and III of the Federal Power Act are now codified at 16 U.S.C. 824, *et seq.*, and 16 U.S.C. 825, *et seq.*; Part I is codified at 16 U.S.C. 791a–823.

large and growing business of transmitting and selling electric power in interstate commerce. S. Rep. No. 621, *supra,* pp. 1–4; H. Rep. No. 1318, 74th Cong., 1st Sess., pp. 3, 7–8; *North American Co.* v. *Securities & Exchange Commission,* 327 U.S. 686; *Jersey Central Co.* v. *Federal Power Commission,* 319 U.S. 61.

Numerous practices of public utility holding companies, exhaustively surveyed by the Federal Trade Commission,[16] were found abusive. Dubious financial practices were among the most pronounced. Those abuses, Congress concluded, resulted from a structural imbalance in the economy whereby there was an intolerable "concentration of economic and political power now vested in the power trust." S. Rep. No. 621, *supra,* p. 11. Congress was aware that there had been no use of the antitrust laws, a potentially effective weapon, to halt or slow the growth of public utility holding companies. *Summary Report,* pp. 47–54.[17] Indeed, through the holding company device, economic concentration in the electric and gas industry had "assumed tremendous proportions." S. Rep. No. 621,

[16] See *Report of the Federal Trade Commission to the Senate of the United States on Holding and Operating Companies of Electric and Gas Utilities,* S. Doc. No. 92, Parts 1–84D, 70th Cong., 1st Sess. The Commission published its conclusions in *Utility Corporations—Summary Report,* 70th Cong., 1st Sess., S. Doc. No. 92, Part 73–A ("*Summary Report*").

[17] Senator Wheeler, in leading the debate on the legislation, commented that if the Sherman Act had "been enforced and executed and upheld as Congress intended * * * I do not think there would have been much question that holding companies could not have been organized." 79 Cong. Rec. 8392.

supra, App. 55.[18] Congress concluded that new legislation was needed to restructure the holding companies and, as restructured, to regulate their activities. Accordingly, Section 11 of Title I of the Public Utility Act (15 U.S.C. 79k) required the reduction of each holding company system into a single, integrated public utility system; while the other sections complemented this restructuring by placing a range of intercompany transactions under the control of the Securities and Exchange Commission.[19]

While Title I of the Public Utility Act thus placed the structure of holding companies under federal control, Title II—applicable to electric utilities engaged in the interstate transmission or sale at wholesale of electric power (16 U.S.C. 824(b) and (e))—was concerned not only with industry structure, but with the operational integrity of the nation's electric power system. Several years prior to the enactment of Title II, this Court had held in *Public Utilities Commission* v. *Attleboro Steam & Electric Co.*, 273 U.S. 83, that the States lack the constitutional power to regulate

[18] Both Senator Wheeler and Representative Rayburn, the sponsors and floor managers of the legislation in the Senate and the House, labelled the situation "private socialism." Hearings Before the Senate Committee on Interstate Commerce, on S. 1725, 74th Cong., 1st Sess. ("Senate Hearings"), pp. 66–70.

[19] Sections 8, 9, and 10 (15 US.C. 79h, 79i, and 79j) placed the acquisitions of securities, utility assets and interests in other businesses under SEC control. Sections 6 and 7 (15 U.S.C. 79f and 79g) require SEC approval for securities issues. Sections 12 and 13 (15 U.S.C. 79l and 79m) either prohibit, or allow only subject to SEC rules, a variety of intercompany financial, service, sales and construction activities.

rates charged in interstate wholesale electric power transactions. In light of this decision and of the rapid growth of the electric power industry, Congress determined that federal regulation of certain aspects of the industry was needed. S. Rep. No. 621, *supra*, p. 17; H. Rep. No. 1318, *supra*, p. 7.

Title II, or Part II of the Federal Power Act, did not establish a regulatory scheme sufficiently comprehensive to preclude the operation of other federal laws, such as the antitrust laws [20] to electric utilities, but it did vest in the Commission important powers in specific areas. Specifically, Section 202(a), 16 U.S.C. 824a(a), directs the Commission to divide the nation into regional power districts and to encourage the voluntary interconnection of transmission and generation facilities within them; Section 202(b), 16 U.S.C. 824a(b), empowers the Commission under certain circumstances to order interconnections and sales and exchanges of electric energy; Sections 205 and 206, 16 U.S.C. 824d and 824e, authorize the Commission to suspend, investigate and fix wholesale rates and charges; and Section 207, 16 U.S.C. 824f, empowers the Commission to order the furnishing of adequate interstate service. Although the Commission's powers are not all encompassing—the Commission, for example, cannot compel a utility to wheel power, *i.e.*, transmit on its facilities another utility's

[20] The applicability of the antitrust laws to certain aspects of the electric power industry is at issue in *Otter Tail Power Co.* v. *United States*, No. 71-991, probable jurisdiction noted, 406 U.S. 944.

power (see S. Rep. No. 621, *supra*, p. 19) [21]—they are extensive; it is within the context of these significant powers over both industry structure and operations that one must view the Commission's obligation to determine whether particular transactions are in the "public interest."

3. There can be no doubt that antitrust policies are relevant to the electric power industry in general (see, generally, Meeks, *Concentration in the Electric Power Industry: The Impact of Antitrust Policy*, 72 Colum. L. Rev. 64 (1972); Shenefield, *Antitrust Policy Within the Electric Utility Industry*, 16 Antitrust Bulletin 681 (1971)), and to the administration of the Federal Power Act in particular. See *California* v. *Federal Power Commission*, *supra*; cf. *Northern Natural Gas Co.* v. *Federal Power Commission*, *supra*; *Pittsburgh* v. *Federal Power Commission*, 237 F. 2d 741 (C.A. D.C.). In considering the Public Utility Act, Congress was aware that "[w]hile the distribution of gas or electricity in any given community is tolerated as a 'natural monopoly' to avoid local duplication of plants * * *," such a local monopoly should be tolerated only within its proper limits. S. Rep. No. 621, *supra*, App. 55.[22] Thus, David Lilienthal, Director of

[21] Although the Commission has no authority to compel wheeling, it is our view that the district courts can compel wheeling in certain circumstances to remedy violations of the antitrust laws. See our brief on the merits in *Otter Tail Power Co.* v. *United States*, No. 71-991, probable jurisdiction noted, 406 U.S. 944.

[22] The appendix to the Senate Report, quoted above, consists of the report of the President's National Power Policy Committee.

the Tennessee Valley Authority and a member of the President's National Power Policy Committee, testified that TVA power could not compete with private power in any municipality from day to day, for two power systems cannot compete in the same locality on that basis. Hearings Before the House Committee on Interstate and Foreign Commerce on H.R. 5423, 74th Cong., 1st Sess., pp. 1962–1963 ("House Hearings"). See also the testimony of Thomas Corcoran, Senate Hearings, pp. 157–159.

But, Mr. Lilienthal explained, there is room for periodic competition: If a private utility does not perform well, the municipality may decide to buy out the company's local system. Further, the local municipal system often has a competitive choice of obtaining its wholesale power either from a private power company, or from a public agency, such as the TVA. House Hearings, pp. 1962–1963.[23] It is precisely this type of competition that the cities charged Gulf States with attempting to suppress (see pp. 5–6, *supra*). Moreover, the Federal Trade Commission called to Congress' attention the existence of a significant amount of valuable competition, both actual and potential, in the power industry. The Commission emphasized the "hundreds" of municipalities which owned their own distribution systems and could make "purchases [of power] from more than one operating system." *Summary Report, supra,* p. 52.

[23] Mr. Lilienthal stated that TVA intended to compete in this way. House Hearings, p. 1963.

In apparent recognition of the role of competition in the electric power industry, the Commission concedes in its brief that antitrust policies must be taken into account in administering many Sections of the Federal Power Act. The Commission states (FPC Br. 13–14):

> Allegations of anticompetitive conduct would be properly raised and fully considered by the Commission in proceedings to order an interconnection under Section 202, 16 U.S.C. § 824a, to approve acquisitions or any merger under Section 203, 16 U.S.C. § 824b, to review rates under Sections 205 and 206, 16 U.S.C. §§ 824d and 824e, to review charges of unduly discriminatory rates or practices under Section 205, 16 U.S.C. § 824d, or to review charges of inadequate service under Section 207, 16 U.S.C. § 824f. * * * [24]

We fully agree that the Commission must consider anticompetitive practices in connection with proceedings under Sections 202, 203, 205, 206 and 207 of the Act. In our view, however, the Commission's concession merely underscores the breadth of its responsi-

[24] In addition, the Commission notes that it may investigate allegedly anticompetitive practices by utilities under Sections 306 and 307, 16 U.S.C. 825e and 825f (FPC Br. 14–15). While this is undoubtedly true, those Sections are couched in terms of enforcing the Federal Power Act and thus do not constitute a general grant of jurisdiction to remedy anticompetitive practices or violations of the antitrust laws. Compare *Pan American World Airways* v. *United States*, 371 U.S. 296. The Commission's primary weapon for curbing anticompetitive practices is the withholding of authorization of transactions which bear some relation to such practices.

bility to administer the Act in accordance with the public interest. Nothing in the Act suggests that the term "public interest" is used in a different and narrower sense in connection with the issuance of securities under Section 204(a) than it is used with respect to an interconnection under Section 202(b) or an acquisition or a merger under Section 203(a).

The Commission's contention (FPC Br. 14) that the cities' antitrust allegations might have been raised in other proceedings misses the point. In the first place, no other proceedings were pending before the Commission and it does not appear that additional Commission-ordered interconnections under Section 202(b) between the cities and the private power companies would have provided the cities with the economies they were seeking from independent arrangements with LEC and Dow Chemical (see pp. 5–6, *supra*). More fundamental, however, is the fact that even if the cities could have aired their grievances in other proceedings, they chose to air them here; if in fact there is substance to their allegations and if in fact the proceeds from the securities issue for which approval is sought would be used to further anticompetitive conduct, then it simply may not be in the "public interest" to approve the issue. It is, therefore, the Commission's responsibility to consider these issues in the present proceeding, as the court below held.[25]

[25] The Commission's contention (FPC Br. 24) that *Statesville v. Atomic Energy Commission*, 441 F. 2d 962 (C.A. D.C.), conflicts with the decision below is without merit. In that case, the

4. Gulf States contends (Br. 19–20) that the court below was inconsistent in construing Section 204 to require the Federal Power Commission to consider anticompetitive factors in approving securities issues while holding that the Securities and Exchange Commission had no similar obligation in approving securities issues under Sections 6 and 7 of the Public Utility Holding Company Act. However, the duties of the two Commissions under their respective statutes—even though the statutes were enacted together as part of the Public Utility Act of 1935—are significantly different. The Public Utility Holding Company Act is concerned primarily with the structures of public utility holding companies and does not vest in the SEC any regulatory jurisdiction over utility operations. Since the anticompetitive allegations of the cities re-

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court held that the Atomic Energy Commission is not required to consider competitive factors in issuing research and development licenses under Section 104(b) of the Atomic Energy Act (42 U.S.C. 2134(b)). As the court was careful to point out, the legislative history of that Act showed that in 1954 Congress had amended it to remove a provision which had given the Commission an affirmative obligation to consider a wide range of competitive factors in the issuance of licenses. It was clear to the court of appeals from the remarks of both the chief sponsor and the opponents of the 1954 amendment that the purpose of the new legislation was to eliminate the Commission's responsibility to consider antitrust policies in its licensing of experimental facilities. 441 F. 2d at 972–973. It was to this specific legislative history that the court of appeals referred when it spoke of "the drafters' intent to narrowly limit antitrust considerations to specific portions of the statute while expanding the health and national security considerations of the Act as a whole." 441 F. 2d at 972. In contrast, the legislative history of Section 204 of the Federal Power Act lacks any indication that Congress intended to exclude consideration of antitrust policies in the administration of that Section.

late primarily to the manner in which the private utilities were conducting their operations and not to the corporate structure of a public utility holding company, the court below correctly held that the SEC had no obligation to consider the allegations.[26] By contrast, the Federal Power Commission is concerned not only with structure; it also has quite extensive authority over the day-to-day operations of public utilities. Accordingly, in determining what is in the "public interest" under Section 204(a), the Federal Power Commission must consider antitrust allegations whether relating to industry structure or to utility operations.

III. CONSIDERATION BY THE COMMISSION OF THE ANTICOMPETITIVE CONSEQUENCES OF SECURITIES ISSUES, IN THE MANNER REQUIRED BY THE COURT BELOW, WILL NOT IMPAIR THE UTILITIES' ABILITY TO RAISE FUNDS

Both the Commission and Gulf States argue that the need of public utilities to raise funds on an expeditious basis militates against including competitive factors as an element of the public interest under Section 204 (FPC Br. 25; Petr. Br. 24–27). This argument, however, is without merit. The decision below fully recognized that securities are often issued on a

[26] Where industry structure *is* at issue, the court of appeals has reached a different result. In *Municipal Electric Association of Massachusetts* v. *Securities and Exchange Commission*, 413 F. 2d 1052 (C.A.D.C.), the court held that under Section 10 of the Public Utility Holding Company Act, the SEC must consider the alleged competitive harm to municipal power companies of holding company acquisitions of stock in two nuclear-power electric generating companies. See also *Municipal Electric Association of Massachusetts* v. *Securities and Exchange Commission*, 419 F. 2d 757 (C.A.D.C.).

tight time schedule and provided for administrative flexibility in considering antitrust issues in connection with the approval of securities under Section 204. Specifically, the court held that the Commission "is not required to hold hearings in matters where the ultimate decision will not be enhanced or assisted by the receipt of evidence" (Pet. App. 22a); the Commission may, without hearing, reject protests raising anticompetitive claims, as long as it provides a reasoned explanation, supported by the record, "that the intervenor's contentions are too insubstantial or barren to indicate the existence of substantial anticompetitive issues, or to meet the requirement of a reasonable nexus between the activities challenged and the activities furthered by the application" (*ibid.*). The court also stated that, in view of the limited time frame in which most securities are issued, the Commission might in some cases approve the great bulk of the issue, or even the entire issue, reserving consideration of the competitive matters until a later time (Pet. App. 22a–23a). Finally, the court indicated that the Commission might defer consideration of such matters pending resolution of relevant antitrust litigation in the courts (Pet. App. 23a).

Of particular relevance here is the fact that the reports of the Interstate Commerce Commission give no indication that financing in the transportation industry has been hindered by the Commission's consideration of anticompetitive issues in authorizing securities issues under Section 20a of the Interstate Commerce Act following this Court's decision in *Denver & Rio Grande*. See 1968 Anual Report of the Interstate Commerce Commission, p. 81; 1969 Annual

Report of the Interstate Commerce Commission, pp. 79–80; 1971 Annual Report of the Interstate Commerce Commission, p. 72. There is no reason to expect that the electric power industry will encounter greater difficulties than the transportation industry. In any event, even if meaningful administrative consideration of relevant issues in proceedings under Section 204 of the Federal Power Act might result in some delays in the sale of some securities issues, that would not justify abdication by the Commission of its obligation to consider as an element of the "public interest" such fundamental national policies as those embodied in the antitrust laws.[27]

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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[27] The Commission's suggestion that affirmance of the decision below may lead utilities to enter holding company arrangements (FPC Br. 26–27) is highly unrealistic in view of the numerous burdens which the Public Utility Holding Company Act places on holding companies and in view of the administrative flexibility provided for in the court of appeals' opinion.

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No. 71-1178

In The Supreme Court of the United States

OCTOBER TERM, 1972

GULF STATES UTILITIES COMPANY,
Petitioner,

v.

FEDERAL POWER COMMISSION,
CITY OF LAFAYETTE, LOUISIANA,
CITY OF PLAQUEMINE, LOUISIANA,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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INDEX

	PAGE
ARGUMENT	1
INTRODUCTION	1
I. RESPONDENT CITIES SUBMIT AND ARGUE A QUESTION NOT PRESENTED IN PETITION FOR CERTIORARI AND ACCORDINGLY IT SHOULD BE DISREGARDED	3
II. CITIES ARGUE § 204 ENABLES THE FPC TO COMPEL WHEELING BY INDIRECTION EVEN THOUGH § 202(b) WITHHOLDS POWER TO DO SO DIRECTLY	3
A. Compulsory Wheeling of Energy by Gulf States is Cities' Goal	3
B. The FPC is Without Power to Order Wheeling under § 202; it Should Not be Within its Power to Require it by Indirection under § 204, thereby Expanding the Area of its Surveillence and the Reach of its Power	5
C. To Permit Wheeling as a Condition to a § 204 Financing Order Would Mean that the Congress Intended to Grant Unrestricted Power to Impose Conditions in an Area of Responsibility in which Only Restricted Power is Granted to Make Direct Orders Under § 202(b)	10
D. Whether Wheeling of Energy Could Be Compelled to Enforce the Antitrust Laws in a Different Forum or by Others than the FPC is not at Issue Here	11
III. FPC SHOULD NOT BE REQUIRED TO CONSIDER ANTITRUST ALLEGATIONS IN A PROCEEDING UNDER § 204 FOR AUTHORIZATION OF SECURITIES	12
A. Opposing Briefs Misinterpret Legislative History Which Indicates the Limited Purposes of § 204	13
B. The FPC is not Authorized to Adjudicate Antitrust Issues	15
C. Lack of Notice Provision in § 204 Evidences Congressional Intent that Adversary Proceedings Were not Contemplated	19

PAGE

D. Convenience to the Cities of Expedition of Determination of Their Right to Relief Does Not Justify a Statutory Construction Creating a Remedy Not Intended by the Congress 20

E. The Congress did not Intend § 204 as a Forum for Considering Private Injuries or a Means of Redressing Them 23

F. Flexibility is Not an Acceptable Substitute for a Proper Construction of § 204 24

IV. THE COURT BELOW ERRED IN FAILING TO GIVE APPROPRIATE WEIGHT TO FPC CONCLUSIONS OF LAW AND ITS DETERMINATION AS TO THE APPROPRIATE SCOPE OF ITS INQUIRY AND ALSO ERRED IN DECLINING TO BE BOUND BY FPC FINDINGS AND CONCLUSIONS OF FACT BASED ON AN UNDISPUTED RECORD 25

V. RESPONDENTS HAVE CONFUSED OBJECT OF SECURITIES ISSUANCE WITH THEIR ALLEGED CONSEQUENCES 28

CONCLUSION 28

CITATIONS

Cases

California v. Federal Power Commission, 369 U.S. 482 (1962) 8, 11, 16

City of Paris, Ky. v. Kentucky Utilities Co., 41 FPC 45 (1969) 5

City of Pittsburg v. Federal Power Commission, 237 F. 2d 741 (D.C. Cir. 1956) 12, 17

Denver & Rio Grande Western R. Co. v. United States, 387 U.S. 485 (1967) 6, 28

Federal Power Commission v. Hope Natural Gas Co., 320 U.S. 591 (1944) 16

Federal Power Commission v. Idaho Power Co., 344 U.S. 17 (1952) 7, 9

Federal Power Commission v. Southern California Edison Co., 376 U.S. 205 (1964) 7

Hormel v. Helvering, 312 U.S. 552 (1941) 26

PAGE

Levison v. Spector Motor Service, 330 U.S. 649 (1947) 26

McLean Trucking Co. v. United States, 321 U.S. 67 (1944).... 12, 16

Montana-Dakota Utilities Co. v. Northwestern Pub. Serv. Co., 341 U.S. 246 (1951) 8, 16, 24

National Broadcasting Company v. United States, 319 U.S. 190 (1943) 16

Northern Natural Gas Company v. Federal Power Commission, 399 F.2d 953 (D.C. Cir. 1968) 17

Otter Tail Power Company v. United States of America No. 71-991 in the Supreme Court of the United States 5, 15

Pennsylvania W. and P.C. v. Federal Power Commission, 343 U.S. 414 (1952) affirming 193 F.2d 230 (D.C. Cir. 1951) 7, 12

Sisselman v. Smith 432 F.2d 750 (3rd Cir. 1970) 19

T.I.M.E. Incorporated v. United States, 359 U.S. 464 (1959) 8

United States v. Chicago, M., St. P. & P.R. Co. 282 U.S. 311 (1931) 8, 9

United States v. P.U.C. of California, 345 U.S. 295 (1953).... 7

United States v. Radio Corporation of America, 358 U.S. 334 (1959) 16

STATUTES

Federal Power Act, 16 U.S.C. § 824 et seq. 2, 15, 16

Part I § 10h, 16 U.S.C. 803(h) 7

Part II (1935) 7, 9

Section 201, 16 U.S.C. § 824 18

Section 202, 16 U.S.C. §824a 5, 13, 22

Section 202(a), 16 U.S.C. § 824a(a) 19

Section 202(b), 16 U.S.C. § 824a(b) 6, 8, 10, 11, 13, 23

Section 203, 16 U.S.C. § 824b 13, 17, 19

Section 203(a), 16 U.S.C. § 824(a) 13

Section 204, 16 U.S.C. § 824c 3, 5-8, 10-15, 18-25, 28

Section 204(b), 16 U.S.C. § 824c(b) 19

Section 205, 16 U.S.C. § 824d 13, 19, 22

Section 206, 16 U.S.C. § 824e 13, 19, 22

Section 207, 16 U.S.C. § 824f 13, 19

PAGE

Section 213, 16 U.S.C. § 825 *l* 26
Section 215(b), 16 U.S.C. 825 *l* 27
Section 306, 16 U.S.C. § 825e 5, 20, 22
Section 307, 16 U.S.C. § 825f 5, 20
Section 308, 16 U.S.C. § 825g 5

Interstate Commerce Act Section 20a 13

Natural Gas Act 9, 15, 17

Public Utility Act of 1935 ..... 13, 14
Part I (1920) 7
Part II of Title II, 49 Stat. 847, 16 U.S.C. 824 7

Sherman Act Section 2 28

LEGISLATIVE HISTORY

Senate Report No. 621, 74th Cong., 1st Sess. 20 at N. 9, p. 654 24

COURT RULES

Supreme Court Rule 40, Sec. 3 3

Supreme Court Rule 40, Sec. 1(d)(2) 3

MISCELLANEOUS

DeVane, Highlights of the Legislative History of the Federal Power Act of 1935 and the Natural Gas Act of 1938, 14 Geo. Wash. L. Rev. 30 (1945) 15

No. 71-1178

In The Supreme Court of the United States

OCTOBER TERM, 1972

GULF STATES UTILITIES COMPANY,
Petitioner,

v.

FEDERAL POWER COMMISSION,
CITY OF LAFAYETTE, LOUISIANA,
CITY OF PLAQUEMINE, LOUISIANA,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPY BRIEF FOR THE PETITIONER

ARGUMENT

INTRODUCTION

The Brief of Respondent Cities and other opposing briefs have revealed for the first time Cities' objective by intervention in this proceeding and thereby has added a new dimension to this case. Cities want Gulf States (and no doubt the other companies they accuse of having conspired in violation of the Sherman Act) to use their transmission lines to wheel (move or transmit) power generated by LEC Pool[1] members between and among such members (members are LEC, the two Cities, and Dow). This feature is emphasized here because it is new. It does not supersede

[1] Shortened or abbreviated names or references to parties, persons, statutes, etc., used in Petition for Certiorari and Brief for the Petitioner where readily identifiable are used here without reidentification. In addition, for convenience, we will sometimes refer to the following by the shortened appellation indicated:

or affect the basic point that the FPC has found Cities' allegations irrelevant to its authorization of the issuance of securities by Petitioner and has also found as a fact on the undisputed record that the object of Petitioner's issuance of bonds was to refund short-term debt. Material aspects of these matters will be dealt with under the topical headings which follow.

"PSCI Br."	Brief Amicus Curiae of Public Service Company of Indiana filed in support of Gulf States, Petitioner.
"Solicitor Gen. Br."	Brief of the United States as Amicus Curiae submitted by the Solicitor General filed in this cause.
"Dow or Dow Br."	The Dow Chemical Company or Brief for the Dow Chemical Company as Amicus Curiae filed in this cause.
"Am.Pub.Pwr.Assoc.Br."	Brief of the American Public Power Association filed as Amicus Curiae in this cause.
"Opposing Briefs"	Respondent Cities' Br., Solicitor Gen. Br., Dow Br., and Am. Pub. Pwr. Asso. Br.
"LEC"	Louisiana Electric Cooperative, Inc.
"LP&L"	Louisiana Power & Light Company.
"CLECO"	Central Louisiana Electric Company.
"ICC"	Interstate Commerce Commission.
"SEC"	Securities & Exchange Commission.
"FPC"	Federal Power Commission.
"Cities"	City of Lafayette, Louisiana, and City of Plaquemine, Louisiana, Respondents herein.
"LEC Pool"	Agreement between LEC, Cities, and Dow entitled Interconnection and Pooling Agreement, dated August 6, 1968, and appearing in full at R. 82, et seq. The pool designation is borrowed from Cities, notwithstanding that the LEC has never sought to intervene as a party to this proceeding nor to file a brief herein.

Where numbered statutory sections are mentioned without other identification, e.g., § 204, such numbered section refers to a section in the Federal Power Act, 16 U.S.C. § 824, et seq., unless the contrary is clearly indicated by context.

I. Respondent Cities Submit and Argue a Question Not Presented in Petition for Certiorari and Accordingly It Should be Disregarded.

Question 2 offered by Cities' brief, p. 3, raises an additional question not presented by Petition for Certiorari, Pet. 2, accordingly is not in compliance with Supreme Court Rule 40, Sec. 3, and Rule 40, Sec. 1(d)(2), and therefore should be disregarded. Such question raised by Cities concerns actions by the FPC subsequent and obedient to the judgment of the court below. See argument in Cities' Br., 46-47.

II. Cities Argue § 204 Enables the FPC to Compel Wheeling by Indirection Even Though § 202(b) Withholds Power to do so Directly.

A. Compulsory Wheeling of Energy by Gulf States is Cities' Goal.

Wheeling of electric energy by Gulf States for the benefit of the LEC Pool members was not sought or mentioned in Cities' Petition to Intervene in the FPC proceeding or until the filing of opposing briefs in response to Petitioners' brief. With the filing of opposition briefs, what could only have been suspected before is now revealed as the real goal behind insistence on the use of § 204 as a tool for antitrust law enforcement. The Cities' purpose is now clear. Cities now say what they want is the use of Gulf States' transmission lines to wheel their own electric energy between and among LEC Pool members:

> In short, by combination, *the Companies have forced the Cities, Dow and LEC to rely upon the transmission capacity of the companies* which they have adamantly refused to make available to the pool members. (Emphasis supplied). Cities' Br. 44.

And again:

> The Commission, of course, whether or not it has the power to compel transmission under Section 202, has ample authority to condition its grants of authority [to issue securities], under Section 204 or otherwise, either upon the cessation of illegal practices or *upon the transmission of power for others over facilities of the applicant,* when such transmission is not inconsistent with good operating practice, in order to cure for the future the illegal practices which have existed in the past. (Emphasis supplied.) Cities' Br. 45-46.

Dow confirms the relevation:

> It is reasonable for Cities to ask, and we think FPC has a duty to require, that use of the proceeds of the issue of securities for carrying out the agreement with LEC be conditioned upon cessation of the conspiracy and an undertaking by Gulf States to provide the pool members with a reasonable alternative to the benefits they had provided for themselves in the pooling agreement. *This could be accomplished by a requirement that energy be transmitted over the companies' system for the pool members at a reasonable and nondiscriminatory rate.* (Emphasis supplied.) Dow Br. 8.

Again:

> A treble damage suit after the fact would be a poor substitute for an order from FPC *conditioning approval of the issuance of securities upon the transmission of electric power for Dow* on reasonable and nondiscriminatory terms. (Emphasis supplied.) Dow Br. 16.

And again:

> So also the power of FPC to refuse to authorize an issue of securities where the proceeds are to be used for an unlawful object includes the power to grant the authorization on conditions reasonably adapted to cure the evil which otherwise would require denial of the authorization. The precise condition will need to be determined by FPC after hearing *but a condition re-*

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quiring Gulf States to transmit power for the members of the pool on a reasonable and non-discriminatory basis would seem to be both necessary and appropriate. (Emphasis supplied.) Dow Br. 17-18.

Even the Solicitor General gives implicit blessing to Cities' purpose, saying, "It does not appear that additional Commission-ordered interconnections under Section 202(b) between the Cities and the private power companies would have provided the Cities with the economies they were seeking from independent arrangements with LEC and Dow Chemical." Solicitor Gen. Br. 35.

B. The FPC is Without Power to Order Wheeling Under § 202; It Should Not be Within Its Power to Require It by Indirection Under §204, Thereby Expanding the Area of Its Surveillence and the Reach of Its Powers.

Both the Solicitor General[2] and the FPC[3] agree and those LEC Pool members appearing here at least implicitly recognize that the FPC would have no power to compel Gulf States to wheel power among the LEC Pool members in a § 202(b) proceeding. Nevertheless, had the FPC yielded to Cities' request that the matter be sent down for a hearing[4] on the antitrust issues and that they be resolved before

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[2] See Solicitor Gen. Br. 87-88 in #71-991, *Otter Tail Power Company* v. *United States of America* pending in this Court.

[3] *City of Paris, Ky.* v. *Kentucky Utilities Co.*, 41 FPC 45 (1969).

[4] Cities' Petition to Intervene, R. 66.

As discussed pp. 19-20 herein, § 204 did not provide Cities the right to a hearing in the proceeding below. Neither § 306, 16 U.S.C. § 825e, Pet. App. 53a nor § 307, 16 U.S.C. § 825f, Pet. App. 54a, reach § 204 proceedings. Section 308, 16 U.S.C. § 825g, Appendix to this brief at p. 1a, adds nothing to Cities' rights as intervenors. The FPC found in its order, Pet App. 35a, R. 303, only that intervention may be in the public interest for purposes of Commission consideration of their petition.

granting authority for the issuance of Gulf States' securities, the practicalities of the situation could have compelled Gulf States to enter some arrangement with Cities impairing its ability to render service to its own customers and not required of it by law or within the power of the FPC to order, simply to escape interference with financing essential to continuation of its operations. What now appears as a reasonable rationalization from opposing briefs is that Cities sought by their initial intervention to create a situation to compel Gulf States to proceed with "the establishment of a program which will rectify the damage which has already been done"[5] by agreeing to wheel power[6] so as to activate the pool in which Cities allege they hold agreements to participate, and what is apparently sought now is either such an agreement by Gulf States under compulsion of meeting the necessity of timely scheduling of financings or a judicial holding which would support an order of the FPC hereafter to condition authority for security issues upon Gulf States' agreement to enter upon some such wheeling arrangement, thus accomplishing by indirect use of § 204 what § 202(b) withholds from the FPC.

Applied to the fact situation alleged by Cities in their intervention before the FPC, the literal application of *Denver & Rio Grande*[6a] would by indirection expand the jurisdiction in two directions. On the one hand it would extend the area of surveillance and on the other hand extend the scope of the relief to intervenors or compulsion of the applicant. Cities propose this expanded power be wielded, not in defense of the public interest, but for their special benefit. The mild sounding suggestion of the Solicitor General that the FPC must consider allegations of antitrust viola-

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[5] Cities' Petition to Intervene, R. 65.

[6] Dow Br. 4.

[6a] Denver & Rio Grande Western R. Co. v. United States 387 U.S. 485 (1967).

tions in connection with its orders issued under § 204, the same as in other sections under which it wields authority, in fact would make § 204 the spearhead of antitrust investigation and activity for it would be made the instrument for investigation of activity the FPC otherwise has no authority to consider and to impose conditions which would compel action it could not directly order. Such construction of § 204 would extend the area of FPC surveillance beyond the periphery of FPC jurisdiction and as far as the FPC could visualize or suspect law violation. Cities' contention is that because the FPC holds the *power* to condition or to withhold altogether authority to issue securities, it must examine allegations of alleged prospective unlawful activity which might be funded indirectly or remotely by the proceeds of the securities issue whether or not such activity were otherwise subject to the FPC's control. As pointed out in Pet. Br. 21, the frivolous and competitive litigation, the mounting of public relations drives and lobbying efforts in which Gulf States and other companies were alleged to have engaged or conspired, are not operational activities which fall within the reach of FPC regulation under Part II of the Federal Power Act,[7] or for which the FPC is granted a power of enforcement by any other laws unless they are permitted to be reached under § 204. As we noted in Pet. Br. 23, n. 52, if the FPC must consider or investigate charges that funds generated by a securities issue will be used to

[7] Cities' Br. 19-20 reargues the application here of § 10h, Part I of the Act, 16 U.S.C. 803(h). That section is inapplicable in the field of interstate commerce in electric energy which Congress first occupied with the enactment of the Federal Power Act in 1935 (Part II of Title II of the Public Utility Act of 1935, 49 Stat. 847-853; 16 U.S.C. 824-824h). *Pennsylvania W. and P. Co.* v. *FPC*, 89 U.S. App. D.C. 235, 242-243, 193 F.2d 230, 237-238 (1951), affirmed, 343 U.S. 414 (1952). Numerous decisions establish the necessity for reading the 1935 Part II independently of the 1920 Part I. See, e.g., *United States* v. *P.U.C. of California*, 345 U.S. 295, 302-304 (1953); *FPC* v. *Idaho Power Co.*, 344 U.S. 17, 22-24 (1952); *FPC* v. *Southern California Ed. Co.*, 376 U.S. 205, 216-220 (1964).

further activities in violation of the Sherman Act, not otherwise the responsibility of the FPC to control, then we see no difference between allegation of antitrust violations and allegations that the funds will or might be used to pay wages pursuant to hiring practices in violation of the equal opportunity law, wage and hour law, safety and pollution law, or any other law the enforcement of which is not entrusted to the FPC.

On the other hand, the contention is that the FPC should impose as a *condition* to an order authorizing issuance of securities something beyond its power to order directly. This Court has held such a condition improper in an action under the Interstate Commerce Act.[8] If § 204 were construed as granting to the FPC the power to require wheeling as a condition to approval of issuance of securities, it would impute to Congress an intention to grant power to the FPC to do indirectly what the Congress has denied it the power to do directly[9] [by withholding from the FPC the power to order wheeling under § 202(b)].

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[8] *U.S.* v. *Chicago, M., St. P. & P.R. Co.*, 282 U.S. 311, 325 (1930).

[9] In discussing the interplay of authority of the Justice Department and the Federal Power Commission with respect to issues affecting the antitrust laws and the Natural Gas Act, this Court said in *California* v. *Federal Power Commission*, 369 U.S. 482, 490 (1962):

"If that administrative action were approved, the Commission would be allowed to do by indirection what it has no jurisdiction to do directly."

To like effect this Court, in discussing and analyzing its previous opinion in *Montana-Dakota Utilities Co.* v. *Northwestern Pub.Serv. Co.*, 341 U.S. 246 (1951) said:

"In the absence of any indication that Congress intended that despite the absence of any reparations power in the Federal Power Commission the federal courts should entertain suits for reparation of unreasonable rates, and refer to the Commission the controlling issue of past unreasonableness, *the Court declined to permit the Commission to accomplish indirectly through such a proceeding that which Congress did not allow it to acomplish directly.*" Emphasis supplied.) T.I.M.E. Incorporated v. United States, 359 U.S. 464, 470 (1959).

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Dow, Br. 17, argues from a premise that since the FPC has the power to withhold authority to issue securities altogether, a public utility should not be heard to complain because issuance on any reasonable terms is better than no issuance at all. Even if otherwise applicable or persuasive, such cases would be unavailing here because the words "reasonable terms" permitted in those cases do not fit the extraordinary remedy sought by Cities in this case. Furthermore, all the cases cited by Dow, p. 17, and in Cities' brief, p. 46, are either rate cases under the Natural Gas Act or hydroelectric cases under Part I of the Federal Power Act and have no application here. For example, the Natural Gas Act cases permit the imposition of conditions with respect to gas prices, a matter the FPC had direct responsibility for under other sections of the Natural Gas Act. While such cases may have permitted the FPC through its conditioning powers to modify or even expand its procedures for control over prices, they clearly did not sanction or support use by the FPC of conditions as a source of plenary power over matters beyond the jurisdiction of the FPC[10] as urged by the Cities. Cities Br. 46 cites *FPC* v. *Idaho Power Company*, 344 U.S. 17 (1952), a case in which the FPC, acting under Part I of the Act, had granted a hydroelectric license on condition that the licensee permit interconnection of transmission facilities of the United States with the licensee's transmission lines and transfer over its lines energy generated in power plants owned by the United States. Cities cite this case as persuasive that the FPC has authority to require Gulf States to wheel energy for the LEC Pool members as a condition to a § 204 order. The cited case is not in point. The opinion makes abundantly clear that its holding is limited to a Part I function. As the court said: "Part I and Part II provide different regulatory schemes. Part II is

[10] United States v. Chicago, M., St.P. & P.R.Co., 282 U.S. 311 (1931).

an exercise of the commerce power over public utilities engaged in the interstate transmission and sale of electric energy." (P. 22) After analyzing sections of Part I of the Act, the court stated: "Under these sections the Commission is plainly made the guardian of the public domain." (P. 23) "And the Commission might well determine . . . that if public lands are to be used for the transmission of power, conservation of the 'water power resources of the region' require that public power as well as private power be transmitted over them." *Ibid.* And further, *"We, therefore, cannot construe the limitation on the new powers conferred by Part II* as a repeal by implication of the powers over licensee that are deeply ingrained in Part I of the Act and put there by the Congress for the purpose of protecting the public domain." (Emphasis supplied.) *Ibid.* Section 204 is, of course, in Part II.

C. To Permit Wheeling as a Condition to a § 204 Financing Order Would Mean That the Congress Intended to Grant Unrestricted Power to Impose Conditions in an Area of Responsibility in Which Only Restricted Power is Granted to Make Direct Orders Under § 202(b).

In §202(b), the Congress authorized the FPC under certain circumstances not only to require public utilities to establish physical interconnection but also to sell energy with the persons thus interconnected. However, the Congress wrote into the statute an express *proviso* that the FPC has *no authority* to compel a public utility to sell or exchange energy when to do so would impair its ability to render adequate service to its customers. The same section provides further: "The Commission may prescribe the terms and conditions of the arrangement to be made between the persons affected by any such order, including the apportionment of costs between them and in the compensa-

tion or reimbursements reasonably due to any of them." A sale of electric energy of necessity involves (i) the generation of electric energy and (ii) transmission of seller's energy over the seller's transmission system to a point of delivery to the buyer. Thus § 202(b) establishes certain principles and limitations on the power of the FPC to order transmission incident to the sale or exchange of power as contemplated therein. "Wheeling" is generally considered to include the use of the transmission system of one party for the transmission of energy from the system of a second party to the system of a third party. If § 204 were construed to grant the FPC power to require wheeling as a condition to authorizing issuance of securities, it would not be under the statutory restraint with regard to transmission which is imposed in § 202(b). We submit that Congress intended no such inconsistency and did not grant or intend to grant a power to the FPC by § 204 to authorize issuance of securities on a condition that the applicant agree to wheel power.

D. Whether Wheeling of Energy Could be Compelled to Enforce the Antitrust Laws in a Different Forum or by Others Than the FPC is Not at Issue Here.

As previously stated, the Solicitor General and the FPC agree that under § 202(b) the FPC has no power to compel wheeling.[11] The case here concerns power of the FPC under § 204. Whether the Justice Department or any other by a proceeding in a United States District Court may seek, and whether such a court may grant, an order to compel a public utility to wheel power as an appropriate remedy for Sherman Act violation is beside the point. That would be a function of enforcement of the antitrust law, a function not entrusted to the FPC. *California* v. *Federal Power Commis-*

[11] Supra, p. 5.

sion, 369 U.S. 482 (1962); *McLean Trucking Co.* v. *United States*, 321 U.S. 67 (1944); *City of Pittsburg* v. *Federal Power Commission*, 237 F. 2d 741 (D.C. Cir.. 1956). It is true that if § 202(a) is a declaration by the Congress that the antitrust laws do not apply to bulk supply of electric energy,[12] then Cities' case falls because of the factual nature of Cities' allegations in this proceeding. But the case before the Court concerns only a § 204 proceeding for authorization of securities. It is thus more narrow in some respects than the position urged by PSCI and Mr. Wahrenbrock and yet more broad in other respects. It is more narrow because the construction urged in the PSCI brief has far wider significance to the laws governing transmission and supply of bulk power than is presented in a § 204 proceeding. Our case is more broad because this Petitioner contends that the FPC should be freed of the burdens Cities would have the Court impose upon it in any § 204 proceeding regardless of the possible involvement of competition in bulk power supply.

III. FPC Should Not be Required to Consider Antitrust Allegations in a Proceeding Under §204 for Authorization of Securities.

The prime purpose of Gulf States' Petition for Writ of Certiorari was to seek a holding by this Court that the Congress enacted § 204 of the Federal Power Act for the limited purpose of preventing the issuance of securities which might impair the Company's financial integrity or its ability to perform its public utility responsibilites.

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[12] This contention is forcefully argued *amicus curiae* by Howard E. Wahrenbrock, PSCI Br. 10, citing *Pennsylvania Water and Power Co.* v. *FPC*, 343 U.S. 414, 421-23 (1952), affirming 193 F.2d 230, 233-38. As the Federal Reporter discloses, Mr. Wahrenbrock, as Asst. Gen. Counsel for the FPC, appeared for it before the D.C. Court of Appeals in the *Penn Water* case.

A. Opposing Briefs Misinterpret Legislative History Which Indicates the Limited Purposes of § 204.

The legislative history of the Public Utility Act of 1935, as well as that of the 1920 amendment of the interstate Commerce Act containing what is now § 20a from which § 204 of the Federal Power Act was in part adapted, bear ample evidence of a congressional purpose to bring to an end the financial abuses of the railroad companies and electric and gas holding company complexes. There seems to be no disagreement that the primary purpose of § 20a in the Interstate Commerce Act and § 204 in the Federal Power Act was to end such financial abuses. However, opposing briefs without exception[13] profess to see an inconsistency in the FPC position that although it may appropriately take into account antitrust laws and anticompetitive activities in proceedings under sections of the Act by which it regulates operations or activities inherent in the utility function[14] nevertheless in § 204 proceedings to approve issuance of securities such considerations are not relevant.[15] Typical of such positions is Solicitor Gen. Br., 34, agreeing with the FPC that it must consider anticompetitive practices in proceedings under sections 202, 203, 205, 206, and 207, but then adding, p. 35:

> Nothing in the Act suggests that the term "public interest" is used in a different and narrower sense in connection with the issuance of securities under Section 204(a) than it is used with respect to an interconnection under Section 202(b) or an acquisition or a merger under Section 203(a).

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[13] American Public Power Association is particularly emphatic. See Am. Pub. Pwr. Assoc. Br. 11.

[14] FPC Br. 12-14.

[15] FPC Br. 20 et seq.

This argument takes no account of the fact that issuance of securities *per se* is not a public utility operation. Only in the Interstate Commerce Act and in the Public Utility Act of 1935 (the ICC under the Interstate Commerce Act, the SEC under the Public Utility Holding Company Act, and the FPC under the Federal Power Act), and in no other industry regulatory act which has come to our attention, does the Congress provide explicitly for jurisdiction over the issuance of securities by the regulating agency. We submit that control over the issuance of securities was granted by Congress in the Public Utility Act of 1935 only because it dealt with an area where financial abuses were apparent and that such control was intended only to stop such abuses.

It may be that the FPC may weight the antitrust laws and anticompetitive considerations among other elements affecting the public interest in making decisions authorizing or regulating industry operations or corporate structural affiliations. If so, then as the FPC points out (FPC Br. 19-20) reading the obligation into or duplicating the effort in a § 204 proceeding is unnecessary and to the detriment of the consumer. Nothing in the Federal Power Act and nothing in its legislative history suggests that granting, withholding, or conditioning authority to issue securities was intended by the Congress to provide a tool for the FPC to assist in the enforcement or to restrain the violation of the antitrust laws.[16] If Congress intended the FPC to use control over issuance of securities as a tool to provide relief to third parties for antitrust violations, or to restrain such violations, then

[16] The Solicitor General's brief, p. 36, n. 25, observes that the legislative history lacks any indication that Congress intended to exclude consideration of antitrust policies in the administration of § 204. This is not surprising in view of the clear primary purpose of the Congress which is so totally unrelated to antitrust, and that financing is merely supportive of rather than being an industry operation of public utilities subject to FPC regulations.

it would have seemed equally suitable for agencies regulating other industries such as gas pipeline companies, shipping companies, airlines, banks, television and radio stations, telephone and telegraph companies. None of these are empowered to authorize securities issuance. We submit that regulation of securities was omitted from the regulatory schemes Congress provided for such industries because the industry histories did not suggest a need to curb financial abuses. If as declared in brief for Respondent Cities, p. 26, regulation of electric companies is substantially less rigorous than the regulatory scheme applicable to natural gas pipelines under the Natural Gas Act, then why, if Congress intended the FPC to use the authorization of securities to deal with anticompetitive activities of electric companies, did it fail to grant explicit authority to the FPC over issuance of the securities of natural gas companies? It is not credible that such omission was accidental. Dozier A. DeVane, one of the draftsmen of the Federal Power Act says[17] the FPC designated Commissioner Seavy to supervise drafting of the Natural Gas Act as he had supervised drafting of the Federal Power Act.

B. The FPC is Not Authorized to Adjudicate Antitrust Issues.

If under § 204 the FPC must consider antitrust allegations such as those of Cities here which relate to activities outside the authority of the FPC under other parts of the Act, it necessarily follows that the FPC's function would be solely to adjudicate the issue of violation rather than to

[17] DeVane, Highlights of the Legislative History of the Federal Power Act of 1935 and the Natural Gas Act of 1938, 14 Geo. Wash. L. Rev. 30 (1945). This article was cited by the Solicitor General in brief filed in No. 71-991, Otter Tail Power Company v. United States, pending before this Court.

weigh antitrust tendencies as a factor in taking some action authorized under other parts of the Act. It is settled that the FPC lacks the power to adjudicate antitrust issues. *California* v. *Federal Power Commission*, 369 U.S. 482, 486 (1962) and see *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 223 (1943). *McLean Trucking Co.* v. *United States*, 321 U.S. 67, 79 (1944), and *United States* v. *Radio Corporation of America*, 358 U.S. 334, at 350, n. 18 (1959). It follows that the FPC could not award reparations for injuries or damages alleged to result from antitrust violations not adjudicated. In fact it appears that the FPC lacks power to grant reparations in any case. This Court has repeatedly held that the FPC lacks power to award reparations in rate cases.[18] In the *Montana-Dakota* case cited in the immediately preceding note in which the court was unanimous in its opinion that the trial court judgment could not stand but divided five to four as to its appropriate disposition, Mr. Justice Frankfurter, speaking for the dissent, said of the Federal Power Act, "The Act likewise does not afford to the Commission the authority conferred on administrative agencies under other regulatory statutes to award damages to those injured by violations of the Act." This was an apparent recognition of a limitation on authority extending beyond the area of rates. If the FPC may not award reparations to those injured by violations of the Federal Power Act, it would surely follow that the FPC has no authority under the Act to award reparations for violations of other laws.

If the FPC had conditioned its authorization for issuance of securities in this case on a requirement to wheel energy for the Cities as now suggested by the Cities, such action

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[18] *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591, 618 (1944); *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Company*, 341 U.S. 246, 254 (1951).

would have of necessity either constituted a grant of reparations to Cities or an indirect injunction against what it judged to be a prospective violation of the antitrust laws. The first is forbidden it under authorities cited in the preceding paragraph. The second would constitute an attempt to enforce the antitrust laws by action beyond the FPC's own authority, a function forbidden it by other authorities cited in the same paragraph and including a prospective situation as recognized in *City of Pittsburg* v. *Federal Power Commission*, 237 F.2d 741, 754 (D.C. Cir. 1956), wherein it said in a case under the Natural Gas Act: "Although *the Commission has no power to enjoin conduct as illegal under the Sherman Act or even to declare such illegality*, it certainly has the right to consider a Congressional expression of fundamental national policy as bearing upon the question whether a particular certificate is required by the public convenience and necessity." (Emphasis supplied.)

It is readily understandable how the FPC could weigh antitrust policy as one element of the public interest under the Natural Gas Act[19] in the course of deciding whether or where a gas pipeline might be laid. It may be equally understandable how the FPC could weigh such considerations in acting, for example, under § 203 of the Federal Power Act to determine whether or not a public utility should be permitted to acquire the stock of an electric utility competitor or potential competitor. But when the FPC is asked to weigh allegations of antitrust violations in connection with authorizing bonds merely for the purpose of refunding short-term debts or, for that matter, considering authorization of securities for cash to fund construction (for which no certification is required) or for general

[19] See e.g., Northern Natural Gas Company v. FPC, 399 F.2d 953, 958 (D.C. Cir. 1968).

corporate purposes of an electric public utility the FPC's function changes. Instead of weighing various considerations bearing on the public interest in approving, modifying, or denying authority to perform an electric industry operation or engage in an industry activity such as to build or acquire a facility or to merge with or acquire the stock of another utility it becomes instead a simple case of judging or making determinations concerning allegations that applicant is about to engage in an activity which would violate the antitrust laws. This is beyond the jurisdiction of the FPC as noted above. The fact that the court below indicates some "nexus" is required does not change the nature of the function proposed for the FPC to perform, to wit, to *judge* as compared to the function of "weighing" as in the gas certificate cases.

The issuance of securities is not an integral function of a public utility involved in transmission of electric energy in interstate commerce or sale of electric energy at wholesale in interstate commerce as such terms are used in § 201 of the Federal Power Act, 16 U.S.C. § 824, and we submit that Congress did not intend that allegations of antitrust law violation or anticompetitive activity be made the subject of FPC's scrutiny except at most as it might be a part of or associated with a public utility operation or activity subject to control of the FPC under some section other than § 204, in which case, as the FPC has observed in its brief p. 11, the matter should be handled under sections relating to such operation or activity without reliance upon § 204.

C. Lack of Notice Provision in § 204 Evidences Congressional Intent That Adversary Proceedings Were Not Contemplated.

Cities dismiss as "totally without merit"[20] the construction Gulf States places on § 204(b) as not requiring the FPC to provide an opportunity for evidentiary hearing to anyone other than the applicant, Cities are not supported by the authorities they cite. Cited FPC regulations may be consistent with but are not supportive of Cities' position that as intervenors in a § 204 proceeding they were entitled to such a hearing. The regulations are equally consistent with a construction that § 204(b) is intended to afford opportunity for hearing only to an applicant in any proceeding in which the FPC authorizes issuance of the securities subject to modifications or upon terms and conditions, or authorizes less than all of the securities applied for. Adjudicatory provisions of the Administrative procedure Act have no application "unless some other statute directs an agency hearing." [*Sisselman* v. *Smith*, 432 F.2d 750, 754 (3rd Cir. 1970) citing numerous cases.] No provisions in the Administrative Procedure Act require opportunity for hearing for any to whom no such opportunity is afforded by the statute in issue [§ 204(b) in this case].

Omission of any sort of notice provision in § 204(b) is significant here because it shows that Congress did not contemplate that parties other than an applicant would participate in any hearings conducted under the section. Contrast the specific provisions for notice contained in § 202(a) and (b), § 203, § 205, § 206 (Pet. App. 44a-52a), and § 207 (Solicitor General's Br. App. 29), each tailored to fit the particular section and to require notice to those who might have an interest and who are intended to have an opporunity to participate in the proceedings. That Con-

[20] Cities Br. 31, n. 34.

gress did not contemplate participation of others than the applicant in § 204 proceedings for authorization of securities is significant here because it points to Congress' intention that proceedings under § 204 not be adversary in nature or provide a forum for airing grievances but should be restricted to consideration of the financial integrity of the issuing company and maintenance of its ability to perform its public utility responsibilities. Adversary issues are thus left for consideration under other sections of the Act where they may be considered in a time frame suitable to the issue and without prejudice to the public interest in the unhampered ability of a public utility to make sound financial arrangements essential to performance of public utility responsibilities.

D. Convenience to the Cities or Expedition of Determination of Their Right to Relief Does Not Justify a Statutory Construction Creating a Remedy Not Intended by the Congress.

Briefs in opposition to Gulf States in this case are uniform in their position that even if some other forum or some other remedy is available to Cities, e.g., proceeding under §§ 306 and 307, Pet. App. 53a-54a, 16 U.S.C. §§ 825e and 825f, or by suit instituted in a judicial tribunal, the remedy would be inadequate because of the longer time which would necessarily be involved in examining antitrust violations or anticompetitive issues, e.g., see Cities' Br. 45, 47-48, Solicitor Gen. Br. 35, Dow Br. 15-16. The point Gulf States sought to make in its original brief is that the availability of other more appropriate forums and suitable remedies is persuasive that none such was intended by the Congress to be available under § 204.

It is the very unsuitability of a § 204 proceeding for consideration of antitrust allegations which gives the section

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its greatest appeal to Cities [21] and to Dow.[22] Their arguments indicate that Cities and Dow are interested in a remedy under §204 for the very reason that the urgency inherent in Gulf States' issuance of securities to refund short term debts or to fund construction and for general corporate purposes might result in achievement of Cities' ends within time frames insufficient to allow proper consideration and thereby eliminate the risk of defeat if the issues were developed in an orderly manner in a proceeding better designed for the purpose. The Solicitor General in his brief, p. 35, shares the view that availability of other remedies should not deprive Cities of their choice of a § 204 proceeding. As stated, these positions avoid our major point that existence of other remedies is sound evidence that the Congress did not intend such a remedy in § 204. If § 204 is distorted to provide Cities with a remedy at an accelerated rate, it can only be at the expense of depriving Gulf States of its right to a fair administrative or judicial hearing of the charges made against it.

In connection with "other remedies," we take note that for the first time anywhere in these proceedings, and wholly without any support in fact or in the record, so far as we can discover, Cities have charged (Cities Br. 45) that Gulf

[21] "In short, the proceeding chosen by the Cities, in accordance with the statutory demand is the only proceeding which is likely to lead to *expeditious and effective relief*." (Emphasis supplied.) Cities' Br. 48.

[22] Dow is frank in acknowledging its interest in having anticompetitive issues disposed of in a securities issuance time frame. It says, "A major advantage of considering anticompetitive allegations in a finance case is that the pressures of time require that the issues be disposed of promptly." Dow Br. 15. And further:

"The argument is also made that the aggrieved parties do not need relief under Sec. 204 because other avenues of relief are available to them, including action by the Department of Justice and treble damage suits. The short answer is that no other remedy presents an acceptable alternative." Dow Br. 15-16.

States was providing wheeling service for others. To distinguish decisions holding that the FPC may not require public utilities to wheel power under § 202, Cities make the surprising contention that:

> the question here presented [is] whether the FPC could order a company *which already provides wheeling service for others* to cease its discriminatory refusal to provide the same sort of transmission service for the complainant under Section 205, which prohibits the granting of undue preferences to any person with respect to any service (such as transmission service) subject to the jurisdiction of the Commission, and also prohibits maintaining "any unreasonable difference in . . . service, facilities, or in any other respect . . . ." See also Section 206 (Emphasis is Cities'.) Cities Br. 45.

Here Cities point directly to a specific complaint (which Cities has not made elsewhere in these proceedings) and to a specific remedy provided by the Act and yet call it "the question here presented." The question here presented is, of course, the validity of FPC orders entered in a § 204 proceeding. If Cities have a complaint of discrimination forbidden by § 205 (Pet. App. 49a-51a, 16 U.S.C. § 824d) the specific statutory remedy is a complaint pursuant to § 306 (Pet. App. 53a, 16 U.S.C. § 825e). For what period of time Cities would contend that the newly claimed discrimination had continued it does not say, but it does appear from Cities' Petition to Intervene that the pooling agreement between them, Dow Chemical Company, and LEC which it seeks to activate by use of the transmission facilities of Gulf States (and perhaps facilities of its alleged co-conspirators) was signed in August of 1968. At least since that time Cities and Dow have maintained and operated their own generators (R. 82), Cities for distribution and resale to its customers, *ibid*, and Dow for its own industrial purposes, *ibid*. Such delay in seeking any remedy does

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not add plausibility to the argument that plainly available remedies are not sufficiently expeditious to satisfy any complaints the Cities may have. If the degree of impact on the parties has a place in this statutory interpretation, then it is fair to suggest that the urgency described by Cities (Br. 16, 47) to enjoy the benefits of the economies of scale which would flow from use of Gulf States' transmission system to activate its paper pool could not by an stretch of the imagination rise to the same importance in terms of public interest that is inherent in the maintenance of Gulf States' financing time schedules for construction and other corporate purposes in procedures under § 204.

E. The Congress Did Not Intend § 204 as a Forum for Considering Private Injuries or a Means of Redressing Them.

Cities chose to intervene in this § 204 proceeding because of a belief that it "is likely to lead to expeditious and effective relief." Cities Br. 48. Cities were not defending the public interest. They were seeking their own relief.

The purpose of Dow is the same. "Assuming that FPC adheres to this position [that it lacks authority to order a utility to wheel electric power], Dow will be faced with the necessity of going to court before it can obtain effective relief." A somewhat inconsistent statement on the same page is, "An independent proceeding before the Commission, as in FPC Docket No. E-7676, is an alternative, it is true, but not a satisfactory one." Dow Br. 16. Even the Solicitor General comes close to sponsoring Cities' purpose by saying, "it does not appear that additional Commission-ordered interconnections under Section 202(b) between the Cities and the private power companies would have provided the Cities with the economies they were seeking from independent arrangements with LEC and

Dow Chemical." Solicitor Gen. Br. 35. Cities' petition alleges past antitrust violations of Gulf States in opposing construction of generation and transmission lines by LEC and contends that Gulf States should not be permitted to issue securities until it "purges itself" for those past sins. However, recovery of money damages is not the goal of Cities' intervention.[23] The goal is satisfaction of the claimed "need for transmission."[24] Such "relief"[25] nevertheless would be a grant of *reparations,* power for which the Congress has withheld from the FPC.[26] No matter how insistently Cities urge, in defense of the public interest, that the FPC condition authorization of securities upon the commitment of Gulf States to wheel electric energy for the LEC Pool, such a condition would amount to no more than reparations to the Cities by substituting Gulf States transmission lines for the LEC transmission lines Cities allege would have been built except for the alleged unlawful opposition of Gulf States to LEC construction.[27]

F. Flexibility is Not an Acceptable Substitute for a Proper Construction of § 204.

Opposition briefs reveal a complete willingness to deprive Gulf States of orderly processes for the determination of legal rights by forcing consideration of antitrust allegations into the time frame of securities issuance. The concept of the Solicitor General is clearly reflected in his brief wherein he insists that if there is substance to Cities' allegations, Cities are entitled to have them heard in this very proceeding, and "it simply may not be in the 'public interest' to

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[23] Cities Br. 47, Dow Br. 15-16.
[24] Cities Br. 47.
[25] Cities Br. 48.
[26] Montana-Dakota Utilities Co. v. Northwestern Public Service Company, 341 U.S. 246 (1951), citing S.Rep. No. 621, 74th Cong., 1st Sess. 20 at n. 9, p. 654.
[27] Cities Br. 7, Dow Br. 4-5.

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approve the issue."[28] Pursuant to FPC order, the bonds have long since been issued, sold at competitive bidding to underwriters, and distributed by them to the public, Pet. Br. 4. The flexibility allowed by the court below which the FPC finds so agreeable and such a satisfactory solution grants more power to the FPC than we believe the Congress intended. It is a very real concern about the broad power placed in the hands of the FPC by that very flexibility which prompted petitioner to seek certiorari. So long as we have the present enlightened Federal Power Commission and legal staff, we would be quite content with the broad discretion allowed for the exercise of their expertise applied in furtherance of the public interest, but we are gravely concerned that if the lower court's opinion is allowed to stand some future Commission, in pursuit of some philosophical objectives at odds with the intent of the Congress, or perhaps merely impatient to clear a cluttered docket, might bring the pressure of threat to withhold authorization of vitally needed securities unless a public utility then making application under § 204 acceded to conditions it was not legally obliged to accept, contrary to the interest of its customers and irrelevant to the proceeding.

IV. The Court Below Erred in Failing to Give Appropriate Weight to FPC Conclusions of Law and Its Determination as to the Appropriate Scope of Its Inquiry and also Erred in Declining to be Bound by FPC Findings and Conclusions of Fact Based on an Undisputed Record.

In the instant case the FPC in proceedings below has already found that intervention by the Cities might be in the public interest for purposes of its consideration of their petition, that there is no relief that it could order in authorizing the issuance of the Bonds that would have

[28] Solicitor Gen. Br. 35.

any effect on the interest of the Cities or solve any of the problems outlined by them, that the matters asserted and activities alleged by Cities are irrelevant to the purpose of issuing bonds to refund short-term indebtedness heretofore authorized and that the matters asserted by Cities do not raise any issue which requires a hearing.[29] To the extent that some of these are conclusions of law this Court has said that while not binding the same are nevertheless persuasive, and it is desirable that a reviewing court have the benefit of such ruling.[30] To the extent that such findings are findings of fact and supported by substantial evidence they are conclusive.[31]

Cities' brief, p. 14, says the court below held lacking in substance a FPC contention that Cities could not be injured because the proposed financing sought only to replace short-term notes with long-term bonds. The FPC did not "contend" but it made findings to that effect.[32] Cities Br. 14 also declares that FPC was unable to answer a question as to the consequence of the refunding presented during oral argument but "conceded it" (Cities imply that it was conceded that the FPC position lacked substance) in a supplemental memorandum filed with the court after oral argument. Such supplemental memorandum by the General Counsel for FPC, which is not in the record, concedes nothing contrary to the FPC findings. It merely advised the court that when Gulf States refunded short-term obligations with the proceeds of the Bonds it could then reborrow the same amount under its short-term authorization. Furthermore, as the court's opinion below said, Pet App. 21a,

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[29] Pet. App. 34a-36a, R.302-303.

[30] Pet. Br. 32. In addition to the authorities there cited, see *Hormel* v. *Helvering*, 312 U.S. 552, n. 5, 556 (1941), *Levinson* v. *Spector Motor Service*, 330 U.S. 49 (1947).

[31] Federal Power Act § 213, 16 U.S.C. § 825 *l*, Pet. App. 56a.

[32] Pet. App. 34a, R. 302.

the court could not permit arguments of counsel to take the place of agency findings (citing cases). Question No. 3 among those presented in Petition for Writ of Certiorari raised the question whether the Court of Appeals could require the FPC to investigate antitrust allegations it had found to be irrelevant. The order of the FPC stated, Pet. App. 34a, R. 302, that "The requested approval of the issuance of the Bonds allow the Company only to change the form of a portion of its outstanding indebtedness. . . . There is no relief that the Commission can order in authorizing the issuance of the Bonds for refinancing purposes that would have any effect on the interest of the petitioners, or solve any of the problems outlined by them." Full quotation of this part of the FPC order appears at Pet. Br. 31. These were findings with regard to matters not in dispute, and were conclusive. The court below should not have reviewed the matter of replacement of short-term notes undertaken in its opinion, Pet. App. 20a-21a, nor should it have rejected the findings in the FPC's order which the court purported to treat (Pet. App. 21a) as merely "contention of FPC counsel." Neither Cities' brief nor explanations in the opinion of the court below at Pet. App. 21a explain that court's description of fact findings in the FPC order as "contentions of counsel" or its statement that "the cryptic statement of the FPC does not permit us to conclude with reasonable confidence that this was the position taken by the FPC," Pet. App. 21a, or justified the court below in disturbing or disregarding the FPC findings. § 215(b), Pet. App. 55a, 16 U.S.C. § 825 *l*. The fact findings in the FPC order, supported by adequate analysis of facts undisputed in the record, should have been treated by the Court of Appeals as binding on it and dispositive of the cause.

V. Respondents Have Confused Object of Securities Issuance With Their Alleged Consequences.

Briefs of Respondents Cities, the Solicitor General, and other parties filing argument in opposition to Gulf States share a common error in confusing the object of Gulf States' issue of bonds with what they allege may be the consequences of use of the proceeds. In so doing, they have ignored the direct, simple, plainly stated and undeniably lawful *object* of refinancing short-term indebtedness declared by Gulf States in its Application, Pet. App. 12, n. 21, R. 5, and found to be the fact in the FPC's order, Pet. App. 34a, R. 302, and insist instead on arguing highly remote, indirect, complicated, speculative, and allegedly unlawful *consequences* which they urge will or might include violations of §2 of the Sherman Act. If it once be established that the FPC in administering § 204 must concern itself not with the immediate object but with possible remote consequences of use of the proceeds of securities issued for cash, as in this case, then the point will have been reached in judicial requirement of complicating and proliferating administrative hearings in unfamiliar fields of which Mr. Justice Harlan warned, remembering the complex Alleghany Corp. litigation, in his dissent in *Denver & Rio Grande*, at p. 518.[33]

CONCLUSION

The arguments presented by Respondents and amici curiae emphasize not only the error of their contention that the FPC considerations under § 204 should extend beyond fiscal integrity and consideration of the public utility's continuing ability to perform its public utility responsibilities, but the differences between this case and *Denver & Rio Grande*. Furthermore, if the FPC is to be required

[33] Denver & Rio Grande Western R. Co. v. United States, 387 U.S. 485 (1967).

to look beyond financial considerations, they should at least be limited to areas of FPC familiarity and authority, and the selection of any limitations or conditions to be placed on the issuance of securities should be restricted to matters within FPC authority to exercise by direct order under other sections of the Federal Power Act or other laws, Otherwise, Pandora's box will be opened, and while the Justice Department might find itself relieved of some of its burdens, the FPC would find itself mired in a morass of investigations in unfamiliar fields serving special interests while its attention to proper functions of protecting the public interest languished. Accordingly, the judgment of the Court of Appeals should be reversed and the orders of the FPC approved.

Respectfully submitted,

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B. H. HUGHES
Counsel for Petitioners

November, 1972

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

GULF STATES UTILITIES CO. *v.* FEDERAL POWER COMMISSION ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71-1178. Argued December 5, 1972—Decided May 14, 1973

Following petitioner's application under § 204 of the Federal Power Act to respondent Federal Power Commission (FPC) for authorization of a bond issue, two intervening cities opposed the authorization on the ground that the proceeds of the bond issue would be used to finance or refinance certain anticompetitive activities in violation of the antitrust laws, the Federal Power Act, and the Public Utility Holding Company Act of 1935. Section 204 (a) empowers the FPC to authorize a security issue only if the issue is found to be for some lawful purpose and compatible with the public interest. The FPC granted the cities' petition to intervene, denied their request for a hearing, and authorized the bond issue, holding that the cities' allegations were irrelevant to a requested authorization of securities under § 204. The Court of Appeals remanded the case for consideration of the cities' claim, holding that, in line with the reasoning in *Denver & R. G. W. R. Co.* v. *United States*, 387 U. S. 485, the FPC should have considered the alleged competitive consequences of the bond issue in the § 204 proceeding. *Held:*

1. The FPC, as a general rule, must consider the anticompetitive consequences of a security issue under § 204. Pp. 8–14.

(a) The Federal Power Act did not render antitrust policy irrelevant to the FPC's regulation of the electric power industry. Pp. 9–11.

(b) The fact that the FPC has broad authority under other provisions of the Act to determine whether a public utility's conduct is in the public interest does not mean that the same standard is not equally germane under § 204. Pp. 11–12.

(c) Consideration of antitrust policies in the context of § 204 provides a first line of defense against anticompetitive practices

Syllabus

that might later become the subject of an antitrust proceeding. P. 12.

(d) The FPC, like the Interstate Commerce Commission, has broad regulatory authority, which includes responsibility for considering antitrust policy in discharging its statutory obligations. Cf. *Denver & R. G. W. R. Co.* v. *United States, supra.* Pp. 12–14.

2. Though the FPC is not necessarily required to hold a hearing or make a full investigation in all cases, its summary disposition of proffered objections to the security issue requires strict scrutiny by a reviewing court in light of the Commission's obligations to protect the public interest and enforce the antitrust laws. Pp. 14–15.

3. Unexplained summary administrative action is incompatible with the requirements of § 204 and precludes appropriate judicial review. Pp. 15–16.

147 U. S. App. D. C. 98, 454 F. 2d 941, affirmed.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and DOUGLAS, BRENNAN, WHITE, and MARSHALL, JJ., joined. POWELL, J., filed a dissenting opinion in which STEWART and REHNQUIST, JJ., joined.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 71-1178

Gulf States Utilities Company, Petitioner, *v.* Federal Power Commission et al. | On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[May 14, 1973]

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

This case presents the question whether, when a public utility applies to the Federal Power Commission for authority to issue a security, as the utility is required to do under § 204 of the Federal Power Act, 16 U. S. C. § 824c,[1] the Commission, in passing upon the applica-

[1] § 824c. Issuance of securities; assumption of liabilities; filing duplicate reports with Securities and Exchange Commission.

(a) No public utility shall issue any security . . . unless and until, and then only to the extent that, upon application by the public utility, the Commission by order authorizes such issue . . . . The Commission shall make such order only if it finds that such issue . . . (a) is for some lawful object, within the corporate purposes of the applicant and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the applicant of service as a public utility and which will not impair its ability to perform that service, and (b) is reasonably necessary or appropriate for such purposes. . . .

(b) The Commission, after opportunity for hearing, may grant any application under this section in whole or in part, and with such modifications and upon such terms and conditions as it may find necessary or appropriate, and may from time to time, after opportunity for hearing and for good cause shown, make such supplemental orders in the premises as it may find necessary or appropriate, and may by any such supplemental order modify the

tion, must consider the issue's anticompetitive effect in determining whether it is "compatible with the public interest," as that phrase is employed in § 204 (a).

I

In October 1970 Gulf States Utilities Company applied to the Federal Power Commission for authority to issue for cash, on competitive bidding, $30,000,000 first mortgage 30-year bonds for the purpose of refunding part of Gulf's then outstanding commercial paper and short-term notes.[2]

Gulf, a Texas corporation qualified to do business in Louisiana, is a public utility, within the meaning of § 201 (e) of the Federal Power Act, 16 U. S. C. § 824 (e). It is engaged principally in the business of generating, distributing, and selling electric energy in southeastern Texas and south central Louisiana in an area of approximately 28,000 square miles with a population of about

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provisions of any previous order as to the particular purposes, uses, and extent to which, or the conditions under which, any security so theretofore authorized or the proceeds thereof may be applied, subject always to the requirements of subsection (a) of this section.

(c) No public utility shall, without the consent of the Commission, apply any security or any proceeds thereof to any purpose not specified in the Commission's order, or supplemental order, or to any purpose in excess of the amount allowed for such purpose in such order, or otherwise in contravention of such order.

[2] Gulf, in its Securities and Exchange Commission registration statement for the bonds, stated that the proceeds received from the notes to be refinanced had been used "in connection with the Company's construction program and for other corporate purposes." App. 162. The notes themselves had been issued upon the authority of an uncontested order in FPC Docket E-7509. The Commission in that proceeding authorized a total of $80,000,000 in short-term debt. Only $55,000,000 of this was outstanding at the time of Gulf's bond authorization proceeding. Thus, apart from the bond issue, Gulf could have borrowed another $25,000,000 in short-term credit without further Commission authorization.

1,225,000. Gulf sells electric energy at retail in numerous communities in that market and, at the time of the application, was providing electric energy for resale to nine municipal systems, 11 rural electric cooperatives (one serving four municipal systems), and one other utility.

The Commission filed notice of Gulf's application. 35 Fed. Reg. 16649 (1970). Thereupon the Cities of Lafayette and Plaquemine, Louisiana, filed a protest and petition to intervene in the proceedings before the Commission and requested a formal hearing on Gulf's application. The Cities alleged that Gulf, in concert with two other investor-owned utilities, Louisiana Power and Light Company (LP&L) and Central Louisiana Electric Company (CLECO), had engaged in activities "apparently violative of the anti-trust laws," as well as of § 10 (h) of the Federal Power Act, 16 U. S. C. § 803 (h),[3] and of the Public Utility Holding Company Act of 1935, 15 U. S. C. c. 2C; that these activities, in effect, would be "financed or refinanced by the bonds here proposed"; and that the utilities' activities were incompatible with the public interest. The Cities opposed the requested authorization "unless and until Gulf States purges itself of these past violations, or unless the Commission conditions its authorization."

The Cities' claim centered on and stressed a 1968 interconnection and pooling agreement between the Cities, Dow Chemical Company, and Louisiana Electric Cooperative, Inc. (LEC). Dow has a plant near the Cities; the plant has generating capacity that could be used by the other members of the pool as emergency stabilizing capacity. LEC is a generation and transmission electric

[3] "Combinations, agreements, arrangements, or understandings, express or implied, to limit the output of electrical energy, to restrain trade, or to fix, maintain, or increase prices for electrical energy or service are hereby prohibited."

cooperative financed by the Rural Electrification Administration; it is a super-cooperative composed of 12 electric distribution cooperatives, all located in the area served by the three utilities.

In 1964 the REA was considering loans to LEC for the construction of a generation station and transmission lines through which LEC would be able to serve eight of its 12 member organizations. These members were then purchasing their power from the three utilities. The Cities claimed that the three utilities had attempted to destroy LEC, and pointed to a history of "extraordinary litigation" instituted by the utilities between 1964 and 1970 to prevent the construction of the station and the lines, and in fact delaying that construction for five years. The arrangement proposed by the 1968 agreement would assure a market for the parties' surplus capacity and would coordinate, at substantial savings, the construction of new generators by the parties. The three utilities, correspondingly, would lose substantial business if the 1968 arrangement were carried out. Accordingly, Cities alleged, the three utilities engaged in frivolous and repetitive litigation and launched a public relations and lobbying drive against LEC in order to block the loan and prevent fulfillment of the agreement. Cf. *California Transport* v. *Trucking Unlimited*, 404 U. S. 508 (1972).

The REA loan was effected, however, in 1969. But by that time the loan was sufficient only for the generating facilities exclusive of the lines. Cities, Dow, and LEC, then were forced to negotiate with the three utilities for the use of the utilities' lines to transmit their power. Cities contended that the three utilities continued, through the course of the negotiations, to block or limit the pool by agreeing only to provide transmission services to some of the pool members; by refusing to supply transmission facilities between pool members unless the 1968 pooling agreement were cancelled; and by demanding

that LEC limit its power capacity to the wattage already planned, thus giving the three utilities the exclusive right to supply all further power needs of LEC's 12 cooperatives and precluding further expansion by LEC.

The Cities, by their proposed intervention, would bring these allegations before the Federal Power Commission in the § 204 proceeding. They claimed that such anticompetitive conduct was properly the subject of a § 204 proceeding and that, under § 204 (b), 16 U. S. C. § 824c (b), the Commission may condition its approval of the bond issue accordingly and place restrictions on Gulf's use of the proceeds.

By its answer Gulf denied any violation of the antitrust laws, of the Federal Power Act, or of the Public Utility Holding Company Act of 1935. It alleged that the purpose of § 204 of the Federal Power Act was "to prevent unsound financing which might impair the financial integrity of public utilities," and that even if the allegations of the Cities were accepted as true by the Commission, those matters were "irrelevant to this application."

By order issued December 3, 1970, 44 F. P. C. 1524, the Commission granted the Cities permission to intervene. It denied their request for a hearing, however, and it authorized the issuance and sale of the bonds. The order recited:

> "The requested approval of the issuance of the Bonds allow [*sic*] the Company only to change the form of a portion of its outstanding indebtedness, it does not call for the initiation of any construction or other program by the Company which might effect [*sic*] the interest of the Petitioners. The alleged violations which petitioners attempt to raise in this proceeding are irrelevant to a requested authorization of securities. There is no relief that the Commission can order in authorizing the issuance of the

> Bonds for refinancing purposes that would have any effect on the interest of the Petitioners, or solve any of the problems outlined by them." 44 F. P. C., at 1525.

The Commission specifically found:

> "The matters asserted and activities alleged in the filed protest and petition to intervene by the Cities of Lafayette and Plaquemine, Louisiana, are irrelevant to the purpose of issuing bonds to refund short-term indebtedness heretofore authorized by this Commission." 44 F. P. C., at 1526.

The petition for rehearing required by § 313 (a) of the Act, 16 U. S. C. § 825*l* (a), see *Department of Fish & Game* v. *FPC*, 359 F. 2d 165, 168–169 (CA9), cert. denied, 385 U. S. 932 (1966), was filed by the Cities, and was denied.

Review was sought pursuant to § 313 (b) of the Act, 16 U. S. C. § 825*l* (b), in the United States Court of Appeals for the District of Columbia Circuit. A unanimous panel of that court disagreed with the Commission and remanded the case to it for consideration of the claims raised by the Cities. 147 U. S. App. D. C. 98, 454 F. 2d 941 (1971). The court recognized that the Commission's contention that Gulf's operations "could have no meaningful relation to an application that only sought to replace short-term notes with long term bonds" was "not without appeal, and also not without problems." 147 U. S. App. D. C., at 109, 454 F. 2d, at 952. The court concluded, however, that the "cryptic statement of the FPC does not permit us to conclude with reasonable confidence that this was the position taken by the FPC." *Ibid.* It observed that the Commission may have rejected the Cities' allegations out of hand upon the authority of its earlier decision in *Pacific Power & Light Co.*, 27 F. P. C. 623 (1962), a position the Court of Appeals

viewed as untenable under this Court's subsequent decision in *Denver & R. G. W. R. Co.* v. *United States*, 387 U. S. 485 (1967).[4]

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[4] Cities also opposed an application of LP&L for approval by the Securities and Exchange Commission of bond and stock issues, the proceeds of which were to be used to repay short-term obligations and for other corporate purposes. Cities contended that the proceeds of these issues would be used for the construction of facilities that would further the unlawful objectives of LP&L, Gulf, and CLEC, and asked that approval by the SEC be conditioned on cessation of the illegal activities and the establishment of a program to remedy the damage already done.

The jurisdiction of the SEC in this instance was based on §§ 6 and 7 of the Public Utility Holding Company Act of 1935, 15 U. S. C. §§ 79f and 79g, which are part of Tit. I of the Public Utility Act of 1935, 49 Stat. 803, 814–817. Sections 6 and 7 contain a number of requirements that must be met for SEC approval of a security issue. The most relevant of these is in § 7 (d), which requires that the SEC "shall permit a declaration . . . to become effective unless the Commission finds that—. . . (6) the terms and conditions of the issue or sale of the security are detrimental to the public interest or the interest of investors or consumers."

The SEC refused to entertain the Cities' protest, concluding that its authority under § 7 (d) (6) related solely to the terms and conditions of the security to be issued, and did not extend to collateral and unrelated controversies in which LP&L might be engaged. The Cities petitioned the United States Court of Appeals for the District of Columbia Circuit for review of the SEC orders, and the matter was consolidated with the present case. The Court of Appeals affirmed the SEC orders, but remanded Gulf's case to the FPC. It explained this diverse treatment as follows:

"Where an agency has some regulatory jurisdiction over operations, it must consider whether there is a reasonable nexus between the matters subject to its surveillance and those under attack on anti-competitive grounds. But the general doctrine requiring an agency to take account of antitrust considerations does not extend to a case like the one before us where the antitrust problem arises out of operations of the regulated company (past and projected) and the agency, here the SEC, has not been given any regulatory jurisdiction over operations of the company. The SEC has no jurisdiction over operations and stands in a different posture from the FPC which,

Inasmuch as the decision of the Court of Appeals raised issues of potential and recurring importance with respect to the authorization of securities by the Federal Power Commission, we granted certiorari. 406 U. S. 956 (1972). The Commission took the position that the Court of Appeals was in error, but nevertheless opposed the grant.

II

The mandate that § 204 of the Federal Power Act, 16 U. S. C. § 824c, imposes upon the Commission is a broad and impressive one. Section 204 (a) empowers the Commission to authorize the issue of a security by a public utility *only* "if it finds that such issue . . . is for some lawful object, within the corporate purposes of the applicant and compatible with the public interest." This requires the Commission to inquire into and to be satisfied with the purposes of the issue and its lawfulness. And even if its "object" is lawful, the necessary inquiry is not ended, for, in addition, the object must be "compatible with the public interest."

In making its determination under § 204 (a), the Commission is given broad powers of inquiry and enforcement. By § 204 (b) it may hold hearings on the application, may grant the application "in whole or in part," may modify it, and may impose such terms or conditions "as it may find necessary or appropriate." After opportunity for hearing, and for good cause shown, it also may supplement, modify, or condition any previous order "as it may find necessary or appropriate." *Ibid.* Section 204 (c) grants the Commission authority to specify the purpose to which the proceeds of the security may be ap-

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as we have already noted, has regulatory jurisdiction over operations in view of its authority, *inter alia*, to direct utilities to interconnect on reasonable terms, or to prohibit a utility *from* discriminating in rates and facilities against its municipal customers" (emphasis in original). 98 U. S. App. D. C., at 112–113, 454 F. 2d, at 955–956.

plied and the amount allowed for that purpose. While, as Gulf observes, §§ 204 (e) and (f) exempt from § 204 (a) certain transactions that concern short-term obligations as well as public utilities that are "organized and operating in a State under the laws of which its security issues are regulated by a State commission," these exemptions [5] do not significantly detract from the sweeping powers and responsibilities of the Commission with respect to public utility security issues generally.

We are asked to hold that the Commission's responsibilities under § 204 do not extend to consideration on its part of possible anticompetitive consequences flowing from the issuance of a security. Gulf and the Commission both argue that administrative inquiry under § 204 is to be narrowly confined to the prevention of the issuance of a security that might impair the utility's financial integrity or its ability to perform its public utility service and responsibilities. Exactly this interpretation was placed on § 204 by the Commission in 1962 in *Pacific Power & Light Co.*, 27 F. P. C., at 626.[6] Gulf and the Commission contend that antitrust considerations of the kind asserted by the Cities do not fall within the limited scope of § 204, as thus defined, and consideration by the Commission of such broad-ranging issues would be incompatible with the need for relatively fast action by the Commission when it passes upon a proposed security issue. It is said that allegations of competitive conduct properly may be raised and fully considered in other proceedings related to interconnections under § 202 of the Act, 16 U. S. C. § 824a, to dispositions and mergers under § 203, 16 U. S. C. § 824b, to rates and rate-making prac-

[5] These exemption provisions have no application to Gulf's security issue challenged by the Cities here.

[6] Cf., however, *Black Hills Power & Light Co.*, 28 F. P. C. 1121 (1962), and 31 F. P. C. 1605 (1964).

tices under §§ 205 and 206, 16 U. S. C. §§ 824d and 824e, and to adequacy of service under § 207, 16 U. S. C. § 824f.

Although allegations similar to those raised here may indeed be made in such other proceedings under the Federal Power Act, we do not regard that fact as determinative of the scope of Commission inquiry under § 204. Instead, the Commission's broad authority to consider anticompetitive and other conduct touching the "public interest" under the other sections of the Act emphasizes the breadth of its authority under the public interest standard generally and as embodied in § 204. This statute was enacted as part of Tit. II of the Public Utility Act of 1935, 49 Stat. 803, 850. The Act had two primary and related purposes: to curb abusive practices of public utility companies by bringing them under effective control, and to provide effective federal regulation of the expanding business of transmitting and selling electric power in interstate commerce. 49 Stat. 803–804, 847–848; S. Rep. No. 621, 74th Cong., 1st Sess., 1–4, 17–20; H. R. Rep. No. 1318, 74th Cong., 1st Sess., 3, 7–8; *Jersey Central Co.* v. *FPC*, 319 U. S. 61, 67–68 (1943); see *North American Co.* v. *SEC*, 327 U. S. 686 (1946). The Act was passed in the context of, and in response to, great concentrations of economic and even political power vested in power trusts, and the absence of antitrust enforcement to restrain the growth and practices of public utility holding companies. See S. Rep. No. 621, *supra*, at 11–12; Utility Corporations—Summary Report, 70th Cong., 1st Sess., S. Doc. No. 92, Part 73–A, 47–54; 79 Cong. Rec. 8392 (1935).

In order to achieve federal regulation of these and other perceived problems on the operational level of the interstate public utility business, Tit. II was enacted. S. Rep. No. 621, *supra*, at 17; H. R. Rep. No. 1318, *supra*, at 7. Part II of Tit. II was denominated the Federal Power Act, 49 Stat. 863. Title II certainly did not preclude the operation of the antitrust laws, and it vested the

Federal Power Commission with important and broad regulatory power in the areas described above. See *Otter Tail Power Co.* v. *United States*, — U. S. — (1973); Meeks, Concentration in the Electric Power Industry: The Impact of Antitrust Policy, 72 Col. L. Rev. 64 (1972). This power clearly carries with it the responsibility to consider, in appropriate circumstances, the anticompetitive effects of regulated aspects of interstate utility operations pursuant to §§ 202 and 203, and under like directives contained in §§ 205, 206, and 207. The Act did not render antitrust policy irrelevant to the Commission's regulation of the electric power industry. Indeed, within the confines of a basic natural monopoly structure, limited competition of the sort protected by the antitrust laws seems to have been anticipated. See *Otter Tail Power Co.* v. *United States*, — U. S., at —; *California* v. *FPC*, 369 U. S. 482 (1962); S. Rep. No. 621, *supra*, at 12; Hearings before the House Committee on Interstate and Foreign Commerce on H. R. 5423, 74th Cong., 1st Sess., 157–159 (1935); Summary Report, *supra*, at 52; Meeks, *supra*.

Nothing in the Act suggests that the "public interest" standard of § 204 contains any less broad directive than that contained in the other similarly worded and adjacent sections. Under the express language of § 204 the public interest is stressed as a governing factor. There is nothing that indicates that the meaning of that term is to be restricted to financial considerations, with every other aspect of the public interest ignored. Further, there is the section's requirement that the object of the issue be lawful. The Commission is directed to inquire into and to evaluate the purpose of the issue and the use to which its proceeds will be put. Without a more definite indication of contrary legislative purpose, we shall not read out of § 204 the requirement that the Commission consider matters relating to both the broad purposes of the

Act and fundamental national economic policy expressed in the antitrust laws. See *FMC* v. *Svenska Amerika Linien*, 390 U. S. 238, 244 (1968); *California* v. *FPC*, 369 U. S., at 484–485; *FCC* v. *RCA Communications, Inc.*, 346 U. S. 86, 94 (1953); *McLean Trucking Co.* v. *United States*, 321 U. S. 67, 80 (1944). Cf. Report of National Power Policy Committee on Public-Utility Holding Companies, in S. Rep. No. 621, *supra*, 55, 59 (App.). Consideration of antitrust and anticompetitive issues by the Commission, moreover, serves the important function of establishing a first line of defense against those competitive practices that might later be the subject of antitrust proceedings. This is particularly significant in the context of a security issue under § 204, for appropriate consideration at a pre-issue stage may avoid the need later to unravel complex transactions in granting relief under the antitrust laws or other sections of the Federal Power Act.

Our conclusion is reinforced by the decision in *Denver & R. G. W. R. Co.* v. *United States*, 387 U. S. 485 (1967). In that case the Court concluded that the Interstate Commerce Commission, in performing its duty, under § 20a (2) of the Interstate Commerce Act, 49 U. S. C. § 20a (2), to determine whether the issuance of a particular security is "for some lawful object . . . and compatible with the public interest," is required, as a general rule, to consider the anticompetitive consequences of the issue. Section 204 of the Federal Power Act was modeled upon § 20a of the Interstate Commerce Act. The initial draft of § 204 was without any broad reference to the public interest. Instead, it identified four specific purposes for which a utility could issue a security (property acquisition; expansion or improvement of facilities or service; discharge or lawful refunding; reimbursement of other expenditures for such purposes). H. R. 5423, § 206, 74th Cong., 1st Sess., 108–109; S. 1725,

§ 206, 74th Cong., 1st Sess., 109–110.[7] This provision intentionally was replaced with the broader language now contained in § 204 in order "to attain greater flexibility and workability than would have been possible under the original section. The language defining the purposes for which securities may be issued has been taken substantially from section 20a of the Interstate Commerce Act, which has proved its usefulness." S. Rep. No. 621, *supra*, at 20. There was, thus, a departure from the specific, and a selection of the general. We perceive no reason to view the responsibility placed on the FPC under § 204 differently from the ICC's responsibility under § 20a of the Interstate Commerce Act. Each agency possesses broad regulatory authority. Each is charged with responsibility for considering antitrust policy under its statute. And § 204 and § 20a are virtually identical in language.[8] The fact that the ICC has a specific obligation

[7] "Sec. 206 (a). No public utility shall issue any security, or assume any obligation or liability as guarantor, indorser, surety, or otherwise in respect of any security of another person, unless and until, and then only to the extent that, upon application by the public utility, the Commission by order authorizes such issue or assumption of liability. The Commission shall make such order only if it finds that such issue or assumption of liability is for one or more of the following purposes and no others, and is reasonably necessary or appropriate for such purpose or purposes; the acquisition of property; the construction, completion, extension or improvement of the facilities or service of the public utility; the discharge or lawful refunding of its obligations; and the reimbursement of moneys actually expended from sources other than the issue of securities for any of the aforesaid purposes in cases where the applicant shall have kept its accounts and vouchers for such expenditures in such manner as to enable the Commission to ascertain the amount of moneys so expended and the purpose for which such expenditure was made."

The foregoing was the Senate version. Except for one spelling and two punctuational differences, the House version was identical.

[8] The FPC has so recognized. *Pacific Power & Light Co.*, 27 F. P. C., at 627.

under § 11 (a) of the Clayton Act, 15 U. S. C. § 21 (a), to enforce § 7 of that Act, as well as a responsibility to advance the National Transportation Policy, did not control the decision in the *Denver* case, see 387 U. S., at 492–493, and the absence of a parallel reference in § 11 of the Clayton Act with respect to the Federal Power Commission is not to be deemed controlling. Cf. *California* v. *FPC*, 369 U. S. 482 (1962).

III

Our conclusion that the FPC must consider anticompetitive aspects of a security issue to which § 204 applies does not end the inquiry, for two subordinate questions remain: whether the agency abused its authority in refusing to hold a hearing on the Cities' objections, and whether, on the facts of this case, the Commission improperly rejected the Cities' allegations out-of-hand on the ground that they were irrelevant to the security issue for which Gulf sought approval.

Gulf asserts that even if the Commission is required to investigate and to consider the Cities' objections under § 204, its refusal to do so here was not error, for the Commission may summarily dispose of objections of this kind without a hearing and extended investigation. Our conclusion that, as a general rule, the Commission must consider anticompetitive consequences of a security issue under § 204 does not mean that the Commission must hold a hearing on objections in every case. Neither does it mean that every allegation must be fully investigated regardless of its facial merit, or that consideration of the allegations may not, in appropriate circumstances, be deferred, or that the major portion of a securities issue may not forthwith be authorized and only the remainder withheld for further study.[9] So strict a rule would un-

[9] The Court of Appeals meticulously outlined various options available to the Commission. 147 U. S. App. D. C., at 110–111, 454 F. 2d, at 953–954.

duly limit the discretion the Commission must have in order to mold its procedures to the exigencies of the particular case, and would be unrealistic in the light of the nature of a proceeding under § 204. The need for flexibility, planning, and rapid coordinated action is particularly acute with respect to the sale of a security on the market. But where the Commission summarily disposes of proffered objections, or where it exercises its discretion to approve an issue without considering its anticompetitive consequences, "the reviewing court must closely scrutinize its action in light of the . . . statutory obligations to protect the public interest and to enforce the antitrust laws. Whether or not an abuse of discretion is present must ultimately depend upon the transaction approved, its possible consequences, and any justifications for the deferral" or summary treatment. *Denver, supra,* 387 U. S., at 498. *Denver,* as we have noted, concerned the ICC, but the foregoing quotation from that opinion has equally forceful application in the FPC context.

Gulf also strenuously urges that the Commission in fact did consider Cities' allegations, although summarily, and properly rejected them on their merits as having no relation to the security issue or to any possible future anticompetitive conduct in which Gulf might engage. We have noted above that the Court of Appeals observed, 147 U. S. App. D. C., at 109, 454 F. 2d, at 952, that certain aspects of this argument are not without substantial appeal. On the basis of the record before us, we cannot say that, upon consideration of the objections raised by the Cities, the Commission would not be justified in rejecting them summarily. But such summary action may not go unexplained in the face of the statutory obligation placed on the Commission under § 204. The decision the Commission thus far has made provides us with an inadequate explanation of its reasons for disposing of the Cities' objections on their merits, if that

in fact is what transpired. We are provided with no explanation of why summary action was warranted, and we are provided with no reason for the Commission's possible conclusion that the objections were meritless. Without more, we are unable "closely [to] scrutinize" the Commission's action. Nor may we supply an alternative, unstated ground to support an agency's decision if that ground is one that "the agency alone is authorized to make." *Securities Comm'n* v. *Chenery Corp.*, 318 U. S. 80, 88 (1943).

The decision of the Court of Appeals in remanding the case to the Federal Power Commission is

Affirmed.

SUPREME COURT OF THE UNITED STATES

No. 71-1178

Gulf States Utilities Company, Petitioner, v. Federal Power Commission et al.	On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[May 14, 1973]

MR. JUSTICE POWELL, with whom MR. JUSTICE STEWART and MR. JUSTICE REHNQUIST join, dissenting.

This case raises the question whether the Federal Power Commission (the "Commission") must consider possible anticompetitive effect on a public utility's application under § 204 of the Federal Power Act, 16 U. S. C. § 824c, for authority to issue a security. Section 204 provides in relevant part that the Commission shall authorize the issuance of a security:

> "only if it finds that such issue or assumption (a) is for some *lawful object*, within the corporate purposes of the applicant and compatible with the *public interest*, which is necessary or appropriate for or consistent with the proper performance by the applicant of service as a public utility and which will not impair its ability to perform that service, and (b) is reasonably necessary or appropriate for such purposes." (Emphasis supplied) 16 U. S. C. § 824c.

Rejecting the Commission's own structuring of its responsibilities and repudiating its uniform administrative interpretation for more than a third of a century, the Court today finds implicit in § 204's use of the phrase "the public interest" a duty on the part of the Commission, when acting upon a financing application, to consider any possible anticompetitive effect that may be

alleged. As I am persuaded neither by the majority's analysis of the statutory language nor by its discussion of the regulatory context, I remain of the view that the Commission's position is consistent with the statute and I would accord it the deference to which it is entitled.[1] Moreover, for the reasons stated below, I believe that the Court's decision is incompatible with the interest of the public in assuring that utilities are enabled to meet their necessary requirements for capital upon the most favorable terms. Accordingly, I dissent.

I

The present proceedings were initiated on October 12, 1970, when Gulf States Utilities Company ("Gulf States") filed an application under § 204 seeking authority to sell $30 million of first mortgage bonds at competitive bidding. The stated purpose for the issuance was to pay off part of its commercial paper and short-term notes, whose issuance previously had been approved by the Commission.

The cities of Lafayette and Plaquemine, Louisiana (the "Cities"), filed a motion to intervene on November 2, alleging a continuing conspiracy among Gulf States, Louisiana Power & Light Co., and Central Louisiana Electric Co. to block the implementation of an Interconnection and Pooling Agreement which would link the Cities, Dow Chemical Company, and Louisiana Electric Cooperative, Inc. (the "Cooperative"). The Coopera-

[1] The interpretation is entitled to great deference:

"When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration. 'To sustain the Commission's application of this statutory term, we need not find that its construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings.' *Unemployment Comm'n* v. *Aragon*, 329 U. S. 143, 153." *Udall* v. *Tallman*, 380 U. S. 1 (1965).

tive had applied in 1964 to the Rural Electrification Administration for a loan to build a generating facility and transmission lines. The Cities contended that Gulf States and its coconspirators had used a number of techniques, including frivolous litigation, to delay approval of the loan until 1969, with the result that the amount of the loan no longer sufficed to build transmission lines as well as a generating plant. The Cooperative was thus forced to rely for transmission services on Gulf States, which, allegedly, would agree to sell them only if the Cooperative would restrict the scope of its operations. The Cities asserted, finally, that the proceeds from the present bond issue would in some way support Gulf State's anticompetitive actions.[2]

On December 3, the Commission granted the Cities' motion to intervene, but declined to hold a hearing on their allegations. The Commission's order explained more fully:

> "The requested approval of the issuance of the Bonds allow the Company only to change the form of a portion of its outstanding indebtedness, it does not call for the initiation of any construction or other program by the Company which might affect the interest of the Petitioners. The alleged violations which petitioners attempt to raise in this proceedings are irrelevant to a requested authorization of securities. There is no relief that the Commission can order in authorizing the issuance of the bonds, for refinancing purposes that would have any effect on the interest of the Petitioners, or solve any of the problems outlined by them." App., pp. 34a–35a.

[2] It was stated in petitioner's brief, (p. 26), and was not challenged, that FPC records fail to show any other like petition to intervene in a financing application under § 204 since its enactment in 1935. The remedy which intervenors are seeking to establish is a new one not heretofore deemed necessary or appropriate by anyone.

In the same order, the Commission authorized the issuance and sale of the bonds. It subsequently modified the order in respects not relevant here and denied a petition for rehearing.

Reviewing the Commission's order at the behest of the Cities, the Court of Appeals held that in a § 204 application proceeding the Commission must consider claims of anticompetitive conduct when urged by intervenors. 454 F. 2d 941 (1971). While the court's ruling was flexible in terms, allowing the Commission to reject without a hearing claims which are "insubstantial or barren" or lack a "reasonable nexus" with the purpose of the securities issuance, it required an explanation "supported in the record," presumably something in addition to that offered by the Commission in this case. 454 F. 2d, at 953.[3]

II

It is common ground that the Commission has a responsibility to deal with anticompetitive practices in the power industry. Section 10 of the Act, 16 U. S. C. § 803, provides that the Commission may issue licenses to public utilities "on the following conditions," one of which is that:

> "(h) Combinations, agreements, arrangements, or understandings, express or implied, to limit the output of electrical energy, to restrain trade, or to fix, maintain, or increase prices for electrical energy or service are herby prohibited." 16 U. S. C. § 308 (h).

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[3] One would have thought that by its use of the phrase "irrelevant to a requested authorization of securities," see p. —, *supra*, the Commission had already found—to use the language of the court—that the claims lacked a "reasonable nexus" with the purpose of the securities issuance.

The question before the Court, then, is not whether the Commission has responsibility, but how and when it shall exercise it.

Stated abstractly, the Commission's position is that the most sensible method of regulating anticompetitive conduct is to focus on the conduct itself rather than on the means by which it may possibly be financed. The Commission acknowledges a duty to scrutinize allegedly anticompetitive behavior in proceedings: to order an interconnection, § 202 of the Act, 16 U. S. C. § 824a; to approve an acquisition or merger, § 203 of the Act, 16 U. S. C. § 824b; to review rates, § 205 and § 206 of the Act, 16 U. S. C. § 824d and § 824e; and to review a charge of unduly discriminatory rates or practices, § 205 of the Act, 16 U. S. C. § 824d, or of inadequate service, § 207 of the Act, 16 U. S. C. § 824f. Additionally, the Commission may investigate unlawful conduct upon a complaint by "any person, State, municipality, or State commission," § 306 of the Act, 16 U. S. C. § 825e, or on its own motion, § 307 of the Act, 16 U. S. C. § 825f. Indeed, upon the complaint of the respondent Cities, the Commission is presently investigating the conduct at issue here. *The Cities of Lafayette and Plaquemine, Louisiana* v. *Gulf State Utilities Company, Louisiana Power & Light Company, Central Louisiana Electric Company*, F. P. C. Doc. No. E–7676.[4]

Given its broad direct authority and its undertaking to investigate allegations of anticompetitive behavior in exercising that authority, the Commission does not think it necessary or appropriate to convert § 204 into an all-

[4] Nor does the Commission have exclusive jurisdiction over antitrust violations by utilities. Antitrust suits may be brought by private parties or by the Antitrust Division of the Justice Department and afford other means of relief.

purpose sword.[5] As the Court of Appeals recognized, there may be no nexus or only a very weak one between the issuance of a security and alleged anticompetitive conduct and, in any event, the charges may be unfounded. It is no answer, in the Commission's view, to say that nexus and merit must be determined on the facts of each case because the process of investigating the allegations will delay the financing and often frustrate the utilities' efforts to obain a favorable price for their securities.

The Commission is properly sensitive to the complexities and subtleties of raising vast sums of money in the financial markets.[6] Utility financing normally is accomplished through competitive bidding participated in by a relatively small number of national investment firms which specialize in the purchase from issuers and the wholesaling of utility securities. The market is highly competitive and is particularly sensitive to uncertainties. The maintenance of an orderly market, with dependable marketing timetables, is essential to the financing process and to favorable decisions by the invest-

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[5] In *Pacific Power & Light Co.*, 27 F. P. C. 623 (1962), the Commission took the same position under analogous circumstances. There, the Commission approved a proposed issuance of securities to fund construction of a politically controversial transmission line, stating:

"The plain purpose of Section 204 is to prevent the issuance of securities which might impair the company's financial integrity or its ability to perform its public utility responsibilites." 27 F. P. C., at 626.

[6] The Commssion has recognized the importance of expedition and adherence to time schedules in the administration of § 204 of the Act:

"It should also be observed that procedures for considering security issues must be expeditious if, in view of changing marketing conditions, utilities are to be able to raise the money to carry out their responsibilities. . . ." *Pacific Power and Light Co.*, 27 F. P. C. 623, 630 (1962).

ment bankers as to rates and other terms. It is settled practice to "bring an issue to market" pursuant to a carefully structured time schedule. When favorable market conditions are observed or anticipated, this time schedule is compressed usually within a period from 45-to-90 days. The longer the lead time is extended and uncertainties injected into the process, the greater the risk of market change or reevaluation with a resulting adverse effect on the cost of capital and, in the end, on the cost of service to the public. Indeed, the public has a double interest in this process. Apart from the ultimate impact on rates which may be occasioned by disruption of the financing process, the utilities may simply be unable to keep pace with the burgeoning public demand for electric energy.[7]

Both the delicacy of financing and the availability of alternative means for regulating anticompetitive conduct, then, strongly support the Commission's interpretation of the Act. Nor does anything in the legislative history

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[7] Prof. Priest has commented on the urgency of new capital for the electric industry:

"Since World War II, the problem of new capital has been, and will continue to be, compellingly urgent for public utility managements." Priest, Principles of Public Utility Regulation, Vol. I, p. 451 (1969).

After describing the "spectacular" growth of the electric utility industry, Prof. Priest compared the urgency of access to the capital markets of utilities with industrial enterprises:

". . . the new capital requirements of the utility industry in the next ten years will call for extraordinary effort. The obvious reasons are (1) that regulated public utilities literally cannot produce as much cash through retained earnings as unregulated industrial enterprises and (2) that the utilities, in any event, need a much larger investment per dollar of annual revenue than the characteristic industrial." *Id.*, at 452.

It is stated in petitioner's brief, and not questioned, that in 1971, 43 applications were filed with the Commission covering the issuance of nearly $1.8 billion of securities. Pet. Brief, p. 24.

of § 204 require a contrary conclusion.[8] The Senate Report states straightforwardly:

> "Control over the capitalization of operating utilities is plainly an essential means of safeguarding the public against the *unsound financial practices* which make impossible the proper and most economical performance of public utility functions." (Emphasis supplied.) S. Rep. No. 621, 74th Cong., 1st Sess., 50 (1935).

And in companion legislation entrusting to the Securities and Exchange Commission (SEC) the responsibility to regulate the issuance of securities by public utility holding companies, Congress declined to require the SEC to investigate anticompetitive conduct, at least in the ordinary case.[9] Even apart from its relevance to congressional purpose, the absence of a requirement for such an investigation when a public utility holding company seeks authorization to issue a security supports the Commission's prudential judgment to accord like treatment to applications from operating utilities.

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[8] Section 204 was enacted as part of Tit. II of the Public Utility Act of 1935. Title II amended the Federal Water Power Act and redesignated it the Federal Power Act.

[9] The Public Utility Holding Company Act was enacted as Tit. I of the Public Utility Act of 1935. See n. 8, *supra*. Under § 7 (d) (6) of the Public Utility Holding Company Act, the SEC is directed to disapprove an issue of securities if its terms and conditions are "detrimental to the public interest or to the interest of investors or consumers." 15 U. S. C. § 79g (d) (6). The SEC has interpreted this language as not requiring it to investigate alleged anticompetitive conduct, and applied this interpretation in an aspect of this litigation involving a substantially identical challenge by these same Cities to a proposed issuance of securities by Louisiana Power & Light Company, a public utility holding company which allegedly conspired with Gulf States. See p. —, *supra*. The SEC rejected the Cities' protests as pertaining to "collateral and unrelated controversies," 454 F. 2d, at 946, and was upheld by the Court of Appeals. 454 F. 2d, at 955.

The securities of public utility holding companies compete in the financial markets with the securities of public utility operating companies. It makes little sense, especially in construing companion legislation applicable to the same industry, to construe the term "public interest" when applied to the operating companies to mean something different, and to impose a more burdensome procedure, than when applied to utilities which are within a holding company system.[10] Yet, this will be the bizarre result of today's decision by this Court.

III

The Court rests its decision in part on *Denver & R. G. W. R. Co.* v. *United States*, 387 U. S. 485 (1967), a case involving the issuance of a controlling stock interest in a carrier regulated by the Interstate Commerce Commission (ICC). In my view, that case falls far short of being a persuasive precedent. The transaction under consideration there was a proposed issuance of common stock by the Railway Express Agency (REA). Approximately 2,000,000 shares of REA stock were held exclusively by railroads, each of which was obligated to offer its shares to the others before selling them to outsiders. REA also was authorized to issue 500,000 shares to whomever it wished, and it entered into an agreement to sell such shares to Greyhound on the condition that Greyhound would offer to purchase an additional 1,000,-

[10] Further evidence of congressional intent can be gleaned from the fact that Congress exempted from scrutiny under § 204 securities of "a public utility organized and operating in a State under the laws of which its security issues are regulated by a State commission." § 213 (f) of the Act, 16 U. S. C. § 824c (f). At the time of the Act, 32 States regulated the issuance of utility company securities. 79 Cong. Rec. 10378 (1935). Had Congress intended to subject securities issues to antitrust screening, it would not, presumably, have esablished this exception.

000 shares from present stockholders, the offer to remain open for 60 days.

As required by § 20a of the Interstate Commerce Act, 49 U. S. C. § 20a, REA applied to the ICC for authorization to issue the 500,000 shares. Under the terms of that section, the ICC may grant authorization "only if it finds that such issue . . . is for some lawful object with [the applicant's] corporate purposes and compatible with the public interest. . . ." 49 U. S. C. § 20a. The ICC authorized the issue without granting a hearing on an intervenor's claim that issuance to Greyhound would give it "control" over REA, or, at a minimum, would lead to a lessening of competition in the freight transportation market. On review in this Court, the ICC argued that its responsibility under § 20a was limited to protecting against financial manipulation, but that even if it did have an obligation to consider "control" and "anticompetitive" effects of the issuance, it could properly defer such consideration until the expiration of Greyhound's offer to purchase a large additional portion of REA's outstanding stock. 397 U. S., at 491–492.

In addressing the ICC's first contention, the Court gave scant attention to the legislative history of § 20a. After noting that an earlier version of what was to become the Interstate Commerce Act "led to a study which condemned as a 'public evil' intercorporate holdings of railroad stock," 387 U. S., at 492 n. 4, the opinion shifted focus:

> "Even if Congress' primary concern was to prevent [fiscal] manipulation, the broad terms 'public interest" and 'lawful object' negate the existence of a mandate to the ICC to close its eyes to facts indicating that the transaction may exceed limitations imposed by other relevant laws." 387 U. S., at 492.

One of the ICC's responsibilities, the Court found, was to consider possible control and anticompetitive conse-

quences, a responsibility deriving specifically from § 5 of the Interstate Commerce Act, 49 U. S. C. § 5, and from § 11 of the Clayton Act, 15 U. S. C. § 21. Under § 5, any conjoining of two or more carriers, either by merger or by transfer of a controlling interest of stock, must be submitted for approval to the ICC, whose approval confers antitrust immunity. Section 11 of the Clayton Act grants to the ICC authority to enforce compliance with the antitrust provisions of § 7 of the same Act, 15 U. S. C. § 18, which prohibit the acquisition by one corporation of the stock or the assets of another where "the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." On the facts before it, the Court saw no abuse of discretion in the ICC's decision to postpone consideration of possible control of REA by Greyhound until the expiration of Greyhound's 60-day offer, but held it an abuse of discretion to defer consideration of a possible § 7 violation.

Section 20a of the Interstate Commerce Act, interpreted in *Denver*, was, as the majority points out, the model for § 204 of the Federal Power Act.[11] But this tie by no means requires that the two sections to be given identical constructions.[12] The *Denver* case involved a different

[11] The Senate Report indicated that § 204:

"follows section 20a of the Interstate Commerce Act in defining the conditions under which such authorization is to be given, the Commission's power to issue orders and the duty of the public utilities to comply with such orders." S. Rep. No. 621, 74th Cong., 1st Sess., 50 (1935).

[12] One can hardly suppose that Congress in 1935 specifically intended to borrow the words of § 20a as they would be construed by this Court in 1967. Congress borrowed the language as it was then understood, because it had "proved its usefulness." S. Rep. No. 621, 74th Cong., 1st Sess., 50 (1935).

Moreover, Congress departed from the Interstate Commerce Act model when it established an exception for state-regulated securities, see n. 10, *supra*, an exception which is not found in the Interstate Commerce Act.

statute and regulatory framework, with a different administrative history.[13] Moreover, the transaction involved in *Denver*, Greyhound's purchase of stock in a regulated carrier, was arguably a *per se* violation of the antitrust laws: the effect of the acquisition might have been "substantially to lessen competition, or to tend to create a monopoly" in violation of § 7 of the Clayton Act. As indicated above, the legislative history of the Interstate Commerce Act showed particular concern with "intercorporate holdings of railroad stock." The immediacy of the antitrust issue and the obligation imposed by § 5 on the ICC with respect to Clayton Act violations justified the Court in overriding the ICC's decision not to address the issue.

In sum, *Denver* has little precedential weight in an FPC case, especially where the transaction does not involve on its face an arguable violation of the antitrust laws.

IV

I return now to the facts in this case. The relationship between Gulf States' proposal to sell bonds for cash on the open market and the anticompetitive activities alleged by the Cities is, at best, an attenuated one. Indeed, the Cities do not claim that the issuance itself will have an

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[13] No less important are the practical differences between utility and railroad financing. Because for several decades the railroads have contracted rather than expanded facilities and services, they have for the most part been able to meet their capital needs from retained earnings and equipment trust financing without resorting to the national markets for additional capital:

"Railroads may not enlarge their trackage significantly and may continue to rely largely on internal resources and the ubiquitous equipment trust to finance additional and more efficient rolling stock. But the electric, natural gas, communications, and water industries, as well as the airlines, must go to the investment fraternity for staggering amounts." Priest, The Principles of Public Utility Regulation, Vol. I, p. 45 (1969).

anticompetitive effect. Nor do they claim that the simple refunding of obligations will have such an effect. Their assertion of a relationship barely goes beyond a bald insistence that the anticompetitive conduct alleged will be "financed or refinanced by the bonds here proposed." Brief for Cities, at 9. Their focus consistently has been not so much on the uses to which the proceeds from the bonds will be put as on the conditions which the FPC might impose on their issuance. Indeed, the Commission believes that the lack of a substantial relationship between the Cities' allegations and petitioner's bond issue is characteristic of the lack of nexus between § 204 financing proposals generally and anticompetitive conduct by utilities.[14]

This, then, is a particularly unlikely case in which to force the Commission to investigate allegations of anticompetitive conduct. The Court apparently considers that the Cities' claim of anticompetitive conduct is at least colorably relevant to the proposed refinancing. If so, it is unlikely that any claim can be found wholly irrelevant. On the basis of today's precedent, the only justification reasonably open to the Commission for refusing to consider allegations of anticompetitive conduct will be that the allegations themselves are patently false.

If the field of inquiry is, as the Cities insist, all of a utility's proposed actions and all of its past actions as

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[14] It is worthy of note that a transaction between two public utilities resembling the transaction proposed in *Denver & R. G. W. R. Co.* would be submitted to the Commission not under § 204 but under § 203, which provides in pertinent part that:

"(a) No public utility shall . . . purchase, acquire, or take any security of any other public utility, without first having secured an order of the Commission authorizing it to do so." 16 U. S. C. § 824b.

In passing on an application under § 203, the Commission would investigate charges of anticompetitive practices. See p. —, *supra*. Thus the specific problem addressed by the Court in *Denver* would not arise under § 204.

they reflect on its proposed actions, it should be no difficult task for an intervenor to force a hearing and findings of fact. As the present case amply demonstrates, the questions of fact may be complicated ones unsuited to summary adjudication. If the Commission finds no anticompetitive conduct, the intervenor will remain free to seek judicial review of the Commission's findings, and thereby cause further delay.

In converting a special-purpose proceeding into a general-purpose one, the Court renounces an administrative interpretation of § 204 founded on the practicalities of utility financing and regulation.[15] Although other established means are available for policing anticompetitive conduct,[16] the Court imposes fresh and ill-defined obstacles to the necessary raising of capital by an industry that needs an expeditious and dependable regulatory process. And, finally, in the name of the "public interest," it ignores the critical fact that mandating a prolonged factfinding process will preclude the Commission from vindicating those aspects of the public interest peculiarly implicated by financing proposals.

I would uphold the Commission and would reverse the decision of the Court of Appeals.

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[15] I would not foreclose the possibility that the Commission should consider in the context of a § 204 application an allegation that the issuance of the security was itself an antitrust violation. But see n. 14, *supra*. The present case is not remotely of this type.

[16] See n. 4, *supra*.

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No. 71-1178

In The Supreme Court of the United States

OCTOBER TERM, 1972

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Petitioner,

v.

FEDERAL POWER COMMISSION,
CITY OF LAFAYETTE, LOUISIANA,
CITY OF PLAQUEMINE, LOUISIANA,
Respondents.

On Writ of Certiorari to The United States Court of Appeals for the District of Columbia Circuit

PETITION FOR REHEARING SUBMITTED BY GULF STATES UTILITIES COMPANY

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June, 1973

FIDELITY PRINTING COMPANY, INC., HOUSTON

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PETITION FOR REHEARING SUBMITTED BY GULF STATES UTILITIES COMPANY

Upon the grounds set forth herein, Gulf respectfully petitions this Court for a rehearing of the decision filed May 14, 1973. The Certificate of Counsel required by Rule 58 is contained at the end of this Petition.

1. **The error of the Court in holding that the FPC order provided "inadequate explanation" of the action it took, and in declining on that ground to review the finding.**

The FPC Order was based solely on a finding that the allegations were irrelevant to the *purpose* of refunding previously authorized short-term debt and discussions were limited to such refunding purpose. Failure to note this is a critical oversight by the Court. The FPC finding (6),

read with the explanation in its Order quoted by this Court's opinion, clearly means that antitrust considerations are irrelevant to Gulf's issuance of bonds *because* such issuance merely accomplishes a refunding of short-term notes. Even if this Court would have stated more artfully the *reason why* the FPC made the finding, the FPC's stated reason should be found sufficient. This Court has said in similar circumstances, "We are not suggesting that the Commission must justify its exercise of administrative discretion in any particular manner or with artistic refinement. We are not sticking in the bark of words." *S.E.C.* v. *Chenery Corp.*, 317 U.S. 80, 95. In the face of extensive argument to the FPC in Gulf's Answer filed prior to issuance of the Order (R. 263, 265-7) that *Pacific Power & Light Co.* was controlling and that antitrust issues were irrelevant to all proceedings under § 204, the FPC Order was not based upon nor did it even refer to *Pacific Power & Light Co.* or on any stated position with regard to its general antitrust responsibilities under § 204 which were examined by this Court.[1] If the contentions of FPC counsel to the courts cannot be accepted by the courts "to take the place of agency findings," how can such contentions and arguments to the courts properly be used by the courts to broaden and make unclear an order otherwise *narrow* and *clear* on its face? If this Court has fear that broader grounds, though unstated, were the true basis of the order, then such fear is causing it to unlawfully usurp the FPC's action *as it stands.*

After granting intervention and reviewing Cities' allegations in relation to Gulf's application, the FPC *explained*

[1] This Court and the Court of Appeals both concluded that the intervenors' objections might have been rejected out of hand on the authority of *Pacific Power & Light Co.* without any justification therefor in the order of the FPC. See slip opinion, p. 6.

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in its order that "The requested approval of the issuance of the Bonds allow that Company *only to change the form of a portion of its outstanding indebtedness . . .*" (Emphasis supplied) and that "There is *no relief* that the Commission can order *in authorizing the issuance of the Bonds for refinancing purposes* that would have any effect on the interest of the Petitioners, or solve any of the problems outlined by them."[2] (Emphasis supplied). The FPC then continued with a finding the clear import of which was that Cities' allegations were irrelevant to the purpose of Gulf's bond issue *because* the issue was merely to refund short-term debt theretofore authorized, which finding predicated its further finding that the allegations did not therefore "raise any issue which requires a hearing" with regard to the refinancing.[3] The FPC then explicitly ordered that the funds be used solely to effect the refinancing. How can it be held, as this Court has done, that "no explanation" is provided?

The Court's refusal to accept the FPC's explanation of its action here is unjustifiably inconsistent with the standard of explanation accepted by this Court recently in *Camp* v. *Pitts*, No. 72-864, ... U.S. ..... (March 26, 1973). In that case this Court *per curiam* found without any trouble that an explanation, which was much less complete than

[2] This explains the *reason why* allegations of antitrust violations were irrelevant to the bond issue. If any question is raised as to the scope of the FPC's concern with "relevance" by its discussion to the effect that "The alleged violations which petitioners attempt to raise *in this proceeding* are irrelevant to a requested authorization of securities" (Emphasis supplied), the narrow scope accorded in this case is made crystal clear by the specific *irrelevance* found in finding (6).

[3] Both this Court and the Court of Appeals have glossed over the two distinct findings. In discussion relating to its holding that the FPC provides an inadequate explanation of its reason for finding Cities' allegations irrelevant to Gulf's security issuance [finding (6)], this Court refers to a portion of the Court of Appeals opinion which relates only to the adequacy of the FPC's statement of its reasons for *denial of a hearing* [finding (7)]. (See the portion of the opinion under caption *Replacement of Short-Term Notes*, 454 F.2d 941, 952-4. Pet. App. 20a-24a, inc.). The Court of Appeals did not mention, and it

that given in this case and was even deemed "curt," *was* sufficient for judicial review. While remand may seem a harmless cure-all, such inconsistency not only violates judicial and constitutional standards, but also produces waste of already overburdened administrative processes.

This case was disposed of by this Court simply on the basis of principles of review of administrative orders which are applicable to all administrative agencies. In its concentration on reviewing broad issues of anticompetitive responsibility and focus on maintaining consistency with its opinion in *Otter Tail Power Co.* v. *U.S.*,[4] this Court has failed to give sufficient attention to the actual basis for its disposition of this case, and has thereby declined to review the very kind of consideration and determination that the opinion seems to require the FPC to make.

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would seem that it could not have considered FPC finding (6) which finds Cities' allegations irrelevant and in which it clearly states its reason for so finding. The reason is so clearly stated there that it is incredible that it was the target of the Court of Appeals description as "cryptic." Such a description could only fit FPC's finding (7). While the FPC did not set out, as a part of its finding (7), its reason for finding that no hearing was required, the reason is self-evident in finding (6). After the FPC determined in finding (6) that the facts alleged by Cities were irrelevant insofar as authorizing the bonds was concerned because the bonds were merely to effect a refunding, going forward with a hearing to receive proof of their truth or falsity could be only a waste of time and serve no purpose in that proceeding. United States v. Storer Broadcasting Company, 351 U.S. 192, 205.

The pertinent FPC findings were:

"(6) The matters asserted and activities alleged in the filed protest and petition to intervene by the Cities of Lafayette and Plaquemine, Louisiana, are irrelevant to the purpose of issuing bonds to refund short-term indebtedness heretofore authorized by this Commission.

"(7) The matters asserted and activities alleged in the filed protest and petition to intervene by the Cities of Lafayette and Plaquemine, Louisiana, do not raise any issue which requires a hearing." Pet. App. 36a.

[4] No. 71-995 decided February 22, 1973, reported 93 S. Ct. 1022.

CONCLUSION

For the reasons stated above, rehearing should be granted, the judgment of the Court of Appeals reversed, and the orders of the FPC approved.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

BENJAMIN D. ORGAIN, a member of the Bar of the Supreme Court and one of the Counsel appearing in this case on behalf of the Petitioner, does hereby certify that this Petition for Rehearing is presented in good faith and not for delay.

Respectfully,

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